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4160

July 6, 1948

SUBJECT: X-RAYS - OWNERSHIP THEREOF
AND RIGHT TO DESTROY.

Gentlemen:

We are in receipt of your request for an opinion as follows:

" R E Q U E S T

"The matter of storing X-ray films at San Francisco Hospital raises the following legal questions pertaining thereto:

"1. Does the ownership of X-rays taken at the hospital remain with the San Francisco Hospital or do they belong to the patient, the hospital merely acting as a film library. These X-rays were taken upon direction of the Hospital's medical staff.

"2. With reference to disposal of old films by San Francisco Hospital what is the proper length of time to retain X-ray films in the following types of cases:

"(a) regular routine X-ray films
"(b) films taken on cases used as teaching cases
"(c) films taken on known pathological cases
"(d) films taken on minor children
"(e) films taken on those who have since expired."

O P I N I O N

The question of ownership of X-rays as between the patient and the doctor or hospital is a novel one and there is very little law on the subject. The only case reported is entitled: "McGarry v. J. A. Mercier Company," decided by the Michigan Supreme Court in 1935, and found in 262 N.W. 296. There the court held that despite the general rule of law which vests ownership of a photograph in the one who employs the photographer, the ownership of X-rays is in

the physician in the absence of an agreement to the contrary. The reasons given for this holding are that the X-ray is practically meaningless to the layman; they constitute an important part of the clinical record of the patient; in the aggregate they may embody and preserve much of the value of the doctor's experience and they are as much a part of the history of the case as any other case record. You are advised therefore, that X-rays taken by the direction of your medical staff are the property of the Hospital.

You next inquire as to the length of time suxh X-rays should be retained.

Section 10008, California Health and Safety Code, requires hospitals to keep a record of the personal and statistical particulars relative to the inmates thereof sufficient and adequate for the completion of a birth or death certificate. No requirement is made that X-rays be kept. Nor can such a requirement be found in any of our State or local laws.

Section 2190 of the California Welfare and Institutions Code authorizes the destruction of case histories of recipients of aid to the aged where the recipient does not receive aid for in excess of five years.

Section 2507 of the same code gives the same authorization with respect to aid furnished to indigients, and Section 3091.5 of the same code gives the same authorization with respect to aid furnished to the needy blind.

Section 203 of the California Welfare and Institutions Code gives the Boards of Supervisors of Counties the right to establish and maintain a county hospital and prescribe for the government and management thereof.

Section 1225 of Political Code and Government Code of the State reads as follows:

> "1225. <u>Destruction of City Records No Longer Required</u>. Unless otherwise provided by law, the head of any city department, with the approval, by resolution, of the legislative body of such city and consent in writing of its city attorney, is authorized to destroy or otherwise to dispose of any record of such city under his charge after they have served their purpose and are no longer required.
>
> "Nothing in this section shall be deemed to authorize the destruction of any record affecting the title to real property or liens thereon, the records of any court, any record required to be kept by State statute or any record less than five years old or the minutes, ordinances or resolutions of the legislative

"body of the city, or of any board or commission thereof."

In the absence of State laws governing the retention of X-rays, local laws would govern. We have none. The only section to which we could turn for guidance is Section 328, Part I, of the Municipal Code. It provides:

"Sec. 328. Destruction of Useless Papers. Any department head as defined in Section 20 of the Charter is authorized to destroy or otherwise dispose of useless papers of such department five (5) years after receipt thereof and after they have served their purpose and are no longer required."

You will note that this section makes no mention of X-rays and it is my suggestion therefore that said section be amended so as to permit the destruction of X-rays. The section as amended would then constitute a blanket resolution of the legislative body, as required by Section 1225 of the Government Code. A proposed amendment is attached to this opinion.

Very truly yours,

CITY ATTORNEY.

TO: DEPARTMENT OF PUBLIC HEALTH
Attention Dr. J. C. Geiger, M.D.

VIA MR. T. A. BROOKS, Chief
Administrative Officer.

CHA

PROPOSED AMENDED FORM
OF SECTION 328

"Sec. 328. Destruction of Useless Papers, Records, X-ray negatives. Any department head as defined in Section 20 of the Charter is authorized to destroy or otherwise dispose of useless papers, records and X-ray negatives of such department five (5) years after receipt thereof and after they have served their purpose and are no longer required."

4161

July 6, 1948

Subject: Wages of Platform men Differ From Bus Operators under Section 151.3.

Gentlemen:

By letters dated June 30 and July 1 you ask the following questions relating to the fixing of wages for platform employees and bus operators of the Municipal Railway be answered:

1 - Is the Board required to fix "wage schedules separately for platform employees and for bus operators, or on the other hand, is the Board required or permitted in its discretion to fix one wage" applicable to both employments?

2 - If one or both of the two highest wage schedules certified by the Civil Service Commission consist of entrance rates of pay, intermediate rates of pay, and maximum rates of pay, all based on service, is the Board of Supervisors required to fix a wage schedule for platform employees and bus operators in the Municipal Railway, which shall be based on only the maximum rates of pay certified by the Civil Service Commission, thereby ignoring the various components of the wage scales as certified by the Civil Service Commission; or is the Board of Supervisors required to fix a wage scale which reflects all the components of the wage scales certified by the Civil Service Commission, that is, an entrance, an intermediate, and a maximum rate of pay where such schedules are certified by the Commission?"

OPINION

Prior to the enactment, in its present form, of section 151.3 of the charter employees of the Municipal Railway engaged in a brief strike as a protest against prevailing wages and working conditions. Wages could not be changed at the time of the strike as the budget for the fiscal year had been adopted; the appropriation ordinance passed making funds available to carry out the budget provision; the annual salary ordinance was in effect and the entire fiscal procedure fixed in accordance with the charter.

The legal impossibility of meeting the requests of the men was made known and they returned to work with the assurance of the then Mayor, the then Board of Supervisors and other city

officials that a charter amendment would be submitted to the voters and actively supported by the officials of the City wherein the wages of platform men would be fixed at the average of the two highest wage schedules paid by other railway systems in California. This was done. The people voted in favor of the amendment.

The writer of this opinion, having in mind the ordinance requiring two men to operate each streetcar in the City and other facts that differed the municipal operation from privately-owned companies, suggested the use of the word "comparable" in the formula, the average of the two highest wage schedules, to be adopted. This was not accepted.

The Civil Service Commission and the Controller submitted paragraphs for the amendment that would affect the conduct of their respective offices and these were included. The attorneys for the groups of employees submitted drafts of this amendment and finally accepted the language as submitted to the voters.

Many provisions discussed during the strike negotiations that the employees desired included in the amendment were excluded as they had no place in a legislative act and properly should be covered by rules for the conduct of the railway. These rules are made by the Public Utilities Commission and the Manager of Utilities and cannot be at variance with charter provisions. During the operation of the Municipal Railway, and we are advised the custom is recognized by other railways, higher wages were paid bus operators as compared with platform men.

In the City's operation pay may only be made for time actually worked but the management found as a fact that bus operators had in many instances to walk several blocks to board the bus assigned before beginning work and similar distances before checking out at the close of the tour of duty. An average time allowance was fixed by the management and payment of wages made on this basis resulting in an advantage to bus operators.

The foregoing is factual but it is deemed necessary to make known some of the background that prompted the amendment to the charter and the difficulties that prefaced the amendment among the employees themselves. The contention is made by the platform men that they consider their duties as onerous as the bus operators and the latter contend they act in the dual capacity of conductors and motormen, hence are entitled to more pay.

We now come to the pertinent parts of the amendment to section 151.3 of the charter required to be construed in order to answer your questions. They read:

"Notwithstanding the provisions of section 151 or any other provisions of this charter the wages of platform employees and bus operators of the municipal railway shall be determined and fixed, annually, as follows:

"(A) On or before the second Monday of July of each year the civil service commission shall certify to the board of supervisors the two highest wage schedules in effect on July 1st of that year for platform employees and bus operators of other street railway systems in the State of California;

"(B) The board of supervisors shall thereupon fix wage schedules for platform employees and bus operators of the municipal railway which shall be the average of the two highest schedules so certified by the civil service commission; provided, if the average of the two highest wage schedules shall be less than the rates of pay fixed for such service in the salary standardization ordinance adopted by the board of supervisors on March 18, 1946, the board of supervisors shall fix wage schedules for such service which shall be the same as the rates fixed for such service in the said ordinance;

* * * * * *

"(D) The rates of pay so fixed for platform employees and bus operators as herein provided shall be effective from July 1st of the fiscal year in which such rates of pay are certified by the civil service commission;."

At the time of writing this opinion the findings of the Civil Service Commission are not available to us but we assume that a certificate from the Commission showing the two highest wage schedules in effect on July 1 with other railway systems in California has been received by you and in these schedules wages will be reported separately showing the two highest wage schedules for bus operators and the two highest for the platform men. This assumption is based on the previous reports made by the Commission.

A fact to be borne in mind is that the Civil Service Commission has made four (4) assignments for transit employees, namely, S-102 Conductor, S-103 Streetcar Operator (female), S-104 Motorman and S-106 Bus Operator. This was done in Bill 5263, Ordinance 4956 (March 18, 1946).

Under sub. (A) the Civil Service Commission must

certify the two highest wage schedules. The word "schedules" is in the plural. Under sub. (B) the Board of Supervisors shall fix wage schedules, again the word is employed in the plural, for platform employees and bus operators, and under (D) it is set out, the rates of pay, again using the plural, shall be effective from July 1.

The repeated use of the plural in the instances cited from the amendment lead to but one conclusion in our minds, and that is that the Civil Service Commission should submit the two highest wage schedules for platform employees and the two highest wage schedules for bus operators and the Board should fix these wages accordingly.

There is nothing of a technical nature in the words used in the amendment and they have an accepted meaning in common usage. The arguments submitted to the voters contain nothing that aids in construing the language under consideration.

In our search we were able to find a case in which the word "schedule" was construed that was analogous to the sense that it is used in the amendment. The case is Hutton v. Gill, 8 N.E. (2d) 818, an Indiana case in which a school teacher attacked schedules of compensation to be paid teachers. In the course of its opinion the Court held at page 820:

> "When the Legislature authorized by statute, the school authorities to fix the amount of the annual compensation of teachers by a salary schedule, and provided that such schedule might be changed by such school corporation, they clearly had in mind a classification of its teachers; a separation into classes and attaching thereto a certain compensation."

So we conclude that the use of the word "schedules" in the amendment contemplated schedules for the work performed by platform men and other schedules for the work performed by bus operators.

It appears to us that the very nature of the employments differs so obviously that there is a natural division between the employments. A motorman on a streetcar operates the conveyance, the conductor collects the fares, and while true a streetcar carries twice the number of passengers compared to a bus, nevertheless a bus operator acts in the dual capacity, operates the bus and collects the fares.

We therefore answer your first question by saying that you may not exercise any discretion in fixing rate schedules for these two classes of employments other than prescribed in section 151.3 and that separate schedules are set up by the Board of

Supervisors for conductors and motormen and a separate schedule for bus operators.

Your second question relates to the establishment of entrance, intermediate and maximum wages. If the Civil Service Commission submits in its certificate schedules of wages that show entrance, intermediate and maximum wages paid either platform men or bus operators, in view of the legal definition of the word schedules and being consistent with the reasoning contained in the part of this opinion relating to your first question it is our opinion that you must take the average of the two highest wages paid in each schedule for those reported at entrance, intermediate and maximum grades. It is our interpretation that you are to fix the average of the two highest wages paid as entrance wages by other railways in California to platform men and the average of the two highest wages paid as an entrance grade to bus operators by other railways. A similar determination should be made through the intermediate and maximum stages.

The very recent case of Adams v. Wolff, 84 A.C.A. 554 (March 19, 1948) involving the rates of pay given automotive machinists and mechanics, in which the first part of section 151.3 was subject to interpretation by the Appellate Court and later a petition for hearing was denied in the Supreme Court, other than defining basic rate of pay in the final paragraph of the opinion and stating that probably under 151.3 basic rate of pay does not relate to working conditions, and holding the section was intended to give public employees the same take-home pay as those in private employment, there is nothing in the opinion helpful in interpreting the language under consideration.

We therefore advise you that

1 - Bus operators and platform men are to have separate wage schedules established; and

2 - The wage schedules established are to reflect the average of the two highest wages paid in each of the entrance, intermediate and maximum grades.

Respectfully submitted,

JOHN J. O'TOOLE, City Attorney

By _____

DION R. HOLM
Public Utilities Counsel

To:
Finance Committee of the
Board of Supervisors

DRH

4162

July 8, 1948

SUBJECT: PETITION FOR SOLE CUSTODY NOT EXEMPT FROM FILING FEE WHEN ADOPTION PROCEEDING FILED IN ANOTHER COUNTY.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

"Please give us an opinion as to the legality of the exemption from fees on special proceedings.

"Here are the facts:

"Petition for adoption was filed in another county in California. Two months later a petition for sole custody of a minor child was filed under a new adoption number in San Francisco County. The Superior Court of San Francisco ordered the County Clerk to charge no fee.

"Heretofore petitions for sole custody were filed as a special proceeding and a fee of $10.00 was charged unless a petition for adoption was on file in San Francisco County.

"Query: Is a petition for sole custody of a minor child filed in a county other than the county in which the petition for adoption is filed, exempt from filing fees?
References: Government Code Sec. 26857
Code of Civil Procedure Sec. 23

"We will appreciate and be guided by an opinion from you on this subject."

OPINION

Government Code Sections 26821 and 26857 relate to fees to be charged by the county clerk and provide in part as follows:

Section 26821: "The fee for the filing of the first paper in a civil action or special proceeding, except a probate proceeding or an adoption proceeding, is six dollars ($6.00) . . . ."

Section 26857: "No fee shall be charged by the clerk for services rendered in any . . . adoption proceedings . . ."

Chapter II of Title II of the Civil Code (C.C. 221-230) relates to adoption proceedings. It appears that the "petition for sole custody" referred to in your letter was filed in connection with Section 224 of the Civil Code which provides that the mother of an illegitimate child may alone consent to adoption.

Section 224 of the Civil Code sets forth the grounds upon which the mother alone may consent to adoption and the procedure to be followed to that end is outlined in the section. No provision is made for the filing of such a petition. Section 226 provides that a consent when reciting that the person giving it is entitled to sole custody of the minor child is prima facie evidence of the right of the person making it to the custody of the child and the sole right of such person to consent.

In the absence of legislative expression in the adoption statutes it would appear that such a petition filed in a county other than the county in which the adoption proceeding is filed is not an "adoption proceeding" within the meaning of Government Code Sections 26821 and 26857, and the petition is subject to payment of filing fees in the same manner as first papers in other civil actions or special proceedings.

It is my opinion, therefore, that a petition of a mother to establish the illegitimacy of a child filed in a county other than the county in which an adoption proceeding is filed is not exempt from filing fees under Government Code Section 26857.

Respectfully submitted,

JOHN J. O'TOOLE

City Attorney

To: County Clerk

TJO'C

4163

July 8, 1948

SUBJECT: SAN FRANCISCO AIRPORT LAND LEASES.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "Will you kindly furnish this office a written opinion covering the required procedure to be followed relative to such leases of City owned lands devoted to airport purposes, under the various sections of the Charter. Also please advise whether an ordinance and a confirming resolution of the Board of Supervisors are required, and how the leases should be executed by the Lessor."

O P I N I O N

Section 93 of the Charter of the City and County of San Francisco governs the leasing of City owned property. This Charter section was amended November 6, 1945, ratified on January 15, 1946, wherein paragraph 2 of said section the following was specifically provided:

> "*** and further, the public utilities commission may provide, by resolution, that lands now devoted to airport purposes or lands that may hereafter be acquired and devoted to airport purposes may be leased or rented for a period not to exceed forty years, and the director of property shall arrange for such lease to the highest responsible bidder at the highest monthly or annual rent, and thereafter the administration of any and all such leases shall be by the public utilities commission, ***." (Emphasis ours.)

It is a fundamental rule of statutory construction that meaning and effect shall be given to every part thereof. See

Crowe v. Boyle, 184 Cal. 117.

Another fundamental rule of construction is that a specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter standing alone would be broad enough to include the subject to which the more particular provision related. Citing

Frandzen v. County of San Diego,
101 Cal. 317.

Applying these rules of construction to Section 93 of the Charter, it is clearly evident from the direct, explicit and unmistakable language of the amendment that the Public Utilities Commission may solely by a resolution of that body provide for leasing of lands devoted to airport purposes, and no ordinance or confirming resolution of the Board of Supervisors is necessary.

The recommended procedure in the leasing of lands devoted to airport purposes would be as follows:

1. A resolution by the Public Utilities Commission authorizing the lease or rental of lands devoted to airport purposes.

2. The invitation for bids published in an official newspaper by the Director of Property.

3. The acceptance of such bid by resolution of the Public Utilities Commission.

Respectfully submitted,

City Attorney.

To: Director of Property.

cc: Chief Administrative Officer.

JGMcB

4164

July 12, 1948

SUBJECT: JUVENILE PROBATION OFFICER HAS JURISDICTION OVER ADULTS CHARGED WITH VIOLATIONS OF WELFARE AND INSTITUTIONS CODE SECTION 702 AND PENAL CODE, SECTION 270

Dear Sir:

We have your request for an opinion as follows:

"Question has arisen on several occasions relative to the responsibility of the Probation Officer in the Juvenile Court Department concerning adults involved in juvenile cases (contributory, etc.) where such cases are handled in the facilities of the Juvenile Court Department and by the Superior Court Judge presiding over the Juvenile Court Department.

"In order to secure some clarification relative to this matter, a communication was submitted to Mr. Don Sanson, Chief of the Adult Division, Los Angeles Probation Department. The following is a quotation from his reply:

'In reference to your letter of April 6 concerning Section 1203.5 Penal Code, and answering your specific questions, I would be of the opinion:

'1. That the Probation Officer appointed under the provisions of the Juvenile Court law, is the only officer in the County having any jurisdiction to make an investigation or probation report, in an offense under Section 702 Welfare and Institutions Code, or under Section 270 Penal Code, and that it is immaterial whether these cases are tried in the Juvenile Court, Superior Court, or any of the lower courts of the County.

'2. That when a defendant is charged with a felony, but is convicted of an offense defined under Section 702 Welfare and Institutions Code, only the Probation Officer appointed under the provisions of the Juvenile Court Law, has any jurisdiction, either to make investigations or reports in reference to such matter or to supervise probationers after conviction in such matters.

'It seems to me very clear that the intention of this Section was entirely to limit Adult

> Probation Officers appointed under the provisions of the Penal Code, from handling matters in any Court involving convictions of contributing to the delinquency of a minor, or failure to provide for a minor child.'

"In reviewing the Juvenile Court law, and in discussing the matter with many departments in the State, there is complete concurrence in the statements made by Mr. Sanson. However, in order to have complete clarification, I should appreciate an Opinion from the City Attorney's Office as to the correctness of the statements submitted.

"Your assistance in this matter will be deeply appreciated."

OPINION

Section 702 of the Welfare and Institutions Code (Section 21 Juvenile Court Law) defines the misdemeanor of contributing to the delinquency of a minor and provides that the Juvenile Court has jurisdiction. Section 270 of the Penal Code provides that the father, and in some instances the mother, of a minor child is guilty of a misdemeanor for wilful failure to provide such minors with necessaries.

Section 1203.5 of the Penal Code provides in part as follows:

> "The offices of adult probation officer, assistant adult probation officer, and deputy adult probation officer are hereby created; provided, that except as hereinafter specified the probation officers, assistant probation officers and deputy probation officers appointed under an act known as the Juvenile Court Law.... shall be ex officio adult probation officers, assistant adult probation officers and deputy adult probation officers respectively except in the case of offenses committed in any city and county and in any county or counties not operating under a freeholders' charter and having a population of more than three hundred thousand and under five hundred thousand and also in any county or counties having a population of more than one hundred thousand and under one hundred ten thousand, as the same is determined by the Federal census taken in the year anno Domini 1920, in which counties and cities and counties the adult probation officers, assistant and deputy adult probation officers appointed under section 1203.7 shall serve under these sections; provided, however, that in all cases of offenses defined by section 21 of said act, known as the Juvenile Court Law and by

section 270 of the Penal Code, the same probation officers, assistants and deputies, shall serve under these sections as are appointed under said Juvenile Court Law."

Under the last proviso of the above section, the juvenile probation officer has jurisdiction over offenses set forth in Section 702 of the Welfare and Institutions Code and Section 270 of the Penal Code.

In addition, with regard to Section 702 of the Welfare and Institutions Code, Section 628 of the Welfare and Institutions Code provides for reports by the juvenile probation officer of "all persons" brought before the Juvenile Court.

It is my opinion, therefore, that the juvenile probation officer has jurisdiction to act in the cases of adults charged with violations of Section 702 of the Welfare and Institutions Code and Section 270 of the Penal Code.

Respectfully submitted,

JOHN J. O'TOOLE

City Attorney

To: Chief Probation Officer.

TMO'C

4165

July 12, 1948

SUBJECT: PURCHASE AND USE TAX--WHETHER PHILIPPINE CONSULATE SUBJECT TO TAX.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "In the attached letter from Thomas Haverty, office supplies, Mr. Haverty states that the Philippine Consulate claims he is not subject to the San Francisco Purchase and Use Tax because of diplomatic exemptions.
>
> "This office respectfully requests a legal opinion on this question."

O P I N I O N

Unlike diplomats, consular officials do not per se by reason of international usage enjoy exemption from taxation by the nation to which they are accredited. However, by treaty consular officials from various nations have been exempted from national, state and municipal taxation on their persons and property under certain prescribed conditions.

On March 14, 1947 the United States signed a consular convention with the New Republic of the Philippines. This treaty was ratified by the UnitedStates Senate on April 14, 1948 and by virtue of Article VI, Section 2 of the United States Constitution became the supreme law of the land with reference to its particular subject matter. Article IV of the Convention provides as follows:

> "Consular officers and employees in a consulate, nationals of the High Contracting Party by which they are appointed or employed, and not engaged in any private occupation for gain within the territories in which they exercise their functions, shall be exempt from all taxes, national, state, provincial and municipal, levied on their persons or property, except taxes levied on account of the possession or ownership of immovable property situated within the territories in which they exercise their functions or taxes levied on account of income derived from property of any

kind situated within such territories. Consular officers and employees in a consulate, nationals of the High Contracting Party by which they are appointed and employed, shall be exempt from the payment of all taxes, national, state, provincial and municipal, on the salaries, allowances, fees or wages received by them in compensation for consular services."

The officials of the local Philippine consulate are nationals of the Republic of the Philippines and under the above treaty provision are exempt from payment of the purchase and use tax on their purchases of tangible personal property except in those instances where they are engaged in a private occupation for gain in which event the tax is applicable.

You are advised accordingly.

Respectfully submitted,

CITY ATTORNEY

To: Chief Administrative Officer

4166

July 13, 1948

SUBJECT: VALIDITY OF PROPOSED AMENDMENT INCREASING MONTHLY RETIREMENT ALLOWANCE OF EMPLOYEES RETIRING UNDER CHARTER SECTION 165.

Gentlemen:

I have your request for an opinion as follows:

REQUEST

"Pursuant to direction of the Judiciary Committee, I transmit herewith to you copy of a proposed charter amendment received from the Retired Municipal Employees League of San Francisco which contemplates an increase in retirement benefits for those employees retired under the provisions of Section 165 of the charter.

"The Committee respectfully requests that you advise it whether or not the proposed amendment is in proper form and also whether or not ratification in its present form might create legal controversies due to the varying effect of the amendment on employees subject to the provisions of both Section 165 and Section 165.2 of the charter."

OPINION

The purpose of the proposed charter amendment is to increase the monthly retirement allowances payable in the future on account of employees heretofore or hereafter retired under Section 165 of the Charter. The amendment relates to the allowances of miscellaneous officers and employees retired under Section 165 before July 1, 1947, and to those thereafter retired who have exercised the option provided in the first paragraph of Section 165.2, to remain under Section 165. In general, the amendment provides a flat future increase of $25 per month in allowance based on twenty (20) or more years' service and proportionate amounts in respect to less periods of service.

1. Your first inquiry is whether the amendment is in proper form.

In my opinion, it is. The language of the amendment is quite skillfully adapted to accomplish the purpose indicated by its terms.

2. You inquire next whether the amendment may cause litigation because of the varying effect on allowances paid under it and Section 165 on the one hand, and under Section 165.2 on the other.

This office cannot advise with assurance as to whether a legislative provision may cause litigation, except as that question relates to the clarity and validity of the language employed. The language of the section being clear, there remains only the question of its validity.

In this regard, I must first consider what the effect of the amendment actually is. Without extensive investigation, I can do this only in part and, in any event, general statements cannot be conclusive because the effect of Section 165.2 on allowances depends on age at retirement as well as other factors entering into the calculation of the allowances. In the absence of individual calculation of all cases, I have taken three instances of service retirement under Section 165.2, at age 70. I have reason to believe that these instances are representative of a considerable number of miscellaneous employees retiring at that age. Data in the three cases follow:

(1)	(2)	(3)	(4)
Member	Monthly Allowance Member Would Have Received Had He Elected To Remain Under Present Section 165	Monthly Allowance Member Receives Under Section 165.2	Monthly Allowance Member Would Receive if He Had Elected To Remain Under Section 165 and if that Section is Amended as Proposed.
X	$289.94	$296.67	$314.94
Y	75.18	85.48	100.18
Z	54.38	62.00	78.67

These three employees, retiring at age 70 under Section 165.2, would therefore, under the proposed amendment, receive substantially more than they are receiving under Section 165.2. This is true in spite of the fact that they have been paying higher rates under Section 165.2 and have accepted as a group lower compulsory retirement ages. I believe that excess payments under the proposed amendment over and above those under Section 165.2 would represent, in varying degree, the cases of a very great number of such employees.

Retirement allowances under both Sections 165 and 165.2 are based on amount of salary, length of service and retirement age of the employee. The method proposed by the amendment under consideration is a departure from the method heretofore used. It is that of a flat increase, graduated only by length of service of less than 20 years. I am advised that superimposing the latter method of flat increase on the former method based on salary, service and age, will inevitably produce inconsistencies similar to those illustrated by the three instances related above.

The law is clear that a reasonable increase of pension may be made either before or after retirement.

See:

Sweesey v. L.A. Etc. Retirement Board, 17 Cal. 2d 356;

Murphy v. City of Piedmont, 17 Cal. App. 2d 569;

Carr v. Fire Commission, 30 Cal. App. 2d 208.

The law is clear that pension legislature not palpably arbitrary will generally be regarded as within legislative discretion and valid.

See:

Brophy v. Employees Retirement System, 71 Cal. App. 2d 455.

The law is also clear that pension legislation will not be held void because it "may work inequality or hardship in some cases" (Bock v. City of Oakland, 19 Cal. App. 2d 115; Jordan v. Retirement Board, 35 Cal. App. 2d 653) or because "some other basis of calculation might be more equitable" (Todd v. McNichols, 44 Cal. App. 2d 448).

However, in the present instance it is not possible to state without an extensive actuarial report, that the proposed amendment would work inequality or injustice in only a relatively few cases.

In such a situation, I must conclude with considerable regret that, in spite of the liberality of the courts in respect to pension legislation, I can have no firm opinion as to the validity of the proposed measure. I must accordingly defer any further opinion until advised more fully of the actuarial effect of the proposed change in our pension system for miscellaneous employees.

Respectfully submitted,

JNO. J. O'TOOLE

CITY ATTORNEY

TO: BOARD OF SUPERVISORS
CC: MAYOR ELMER E. ROBINSON

WP

4167

July 15, 1948

SUBJECT: PALACE OF FINE ARTS MAY BE TRANSFERRED FROM THE POSSESSION, CONTROL AND MANAGEMENT OF THE PARK COMMISSION TO DEPARTMENT OF PROPERTY.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

R E Q U E S T

"Will you please advise this office whether it is legal for the Park Commission to transfer control of the Palace of Fine Arts Building to the Real Estate Department of the City and County of San Francisco?

"The property on which the building is now located was a portion of the Presidio Reservation and was conveyed to the City and County of San Francisco by the United States Government for 'educational, art, exposition, and park purposes', by an Act of Congress on March 3, 1925, and was accepted by the Board of Supervisors under Resolution No. 27441, New Series, adopted June 20, 1927.

"The property was placed under the control of the Park Commission by Resolution No. 23280 adopted by the Board of Supervisors on July 16, 1925.

"If, in your opinion, it is legal for the Park Commission to transfer control of the said Palace of Fine Arts Building to the Real Estate Department, as hereinabove stated, will you please outline the procedure that this Commission must follow in order to consummate the transfer.

"An early reply will be appreciated, as the Commission would like to take action prior to the commencement of the fiscal year."

O P I N I O N

You are referred to my opinion of May 20, 1947, addressed to the Park Commissioners, which opinion sets forth the status of the title to the property upon which the Palace of Fine Arts is located. The title to this 9.93 acres of land was originally held by the United States and was deeded to the City and County of San Francisco on June 3, 1927, pursuant to an Act of Congress of March 3, 1925 (43 Stats. at Large, p. 1129). The deed was recorded in the office of the Recorder of the City and County of San Francisco on June 24, 1927 in Volume 1502 of Official Records at page 11. The Act of Congress

and the deed contain a provision that the land is granted for "educational, art, exposition and park purposes." The grant contains a provision reserving to the United States the right to take possession of the property in the event of war or other national emergency.

Under Resolution No. 24280 (New Series) adopted by the Board of Supervisors on July 16, 1925, the possession, management and control of the property was given to the Park Commission.

The general rule of law is that property dedicated for park purposes cannot, thereafter, be used for purposes which are not included within the definition of "park purposes." Under Section 41 of the Charter, the Park Commissioners are granted exclusive control over parks and the transfer of park property to the possession, control and management of another City Department would be inoperative and ineffective. You are referred to my opinion dated August 10, 1945, addressed to the Park Commissioners, wherein it was stated that dedicated park land could not be transferred to other city departments, and in which I stated, in part, as follows:

> "Lands so dedicated for park purposes cannot be utilized for any other purpose or diverted to any other departmental jurisdiction.
>
> "The cases uniformly hold this to be the law, the only exception being in the instance of the use of some portion of the park property for purpose consistent with or in furtherance of the specific use for which the property was acquired or dedicated.
>
> "In this connection the following language is significant:
>
> Hall v. Fairchild-Gilmore-Wilton Co., 66 Cal. App. 615 at page 624:
>
> "'It may be said that the Board of Park Commissioners is entrusted by the City Charter with the management and control of the park property . . . . However, this Charter provision confers no authority upon the Board of Park Commissioners to destroy the subject of the trust or to devote it to use other than that of enjoyment and recreation. Its authority is merely that of a trustee invested with limited jurisdiction, having imposed upon it the duty to protect parks within its management and control, which should at the same time compel such board to protect, rather than instigate usurpation of authority over parks of the city by another body, or pass its trust property into the street department.'"

However, the property upon which the Palace of Fine Arts is located was not granted exclusively for park purposes. The grant

contains the provision that the land may, in addition, be used for educational, art and exposition purposes. A use of the land for any one or more of these purposes would appear to be within the terms of the grant. The land need not necessarily be used for park purposes. When land may be used for other than park purposes, the Board of Supervisors may give possession, control and management to other city departments.

You have stated that it is the desire of the Park Commission to transfer the possession of the property to the Department of Property. The Director of Property is limited by the terms of the grant in making leases or other contracts relative to the land. This, however, does not affect the power of the Board of Supervisors to give possession, control and management to the Department of Property, and the transfer may be made by resolution of the Board. It is my opinion, therefore, that possession, control and management of the Palace of Fine Arts may be transferred from the Park Commission to the Department of Property by resolution of the Board of Supervisors in view of the desires of the Park Commission.

Very truly yours,

JNO. J. O'TOOLE

CITY ATTORNEY

TO: PARK COMMISSIONERS
McLaren Lodge
San Francisco (17)
Attention: Gerald J.
Linares, Secretary.

4168

July 20, 1948

SUBJECT: ASSESSMENTS, CANCELLATION OF; ERRONEOUS; ILLEGAL ASSESSMENTS.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

REQUEST

"Your attention is respectfully directed to Section 4986 of the Revenue and Taxation Code of the State of California, which provides for the procedure for cancellation of uncollected taxes.

"This section lists the reasons for cancellation. Most cancellation requests fall within the first two classes listed:

"'(a) More than once.

"'(b) Erroneously or illegally.'

"Because of the time limits set by State law on the Assessor's work, and the employment of temporary seasonal personnel, assessment errors do occur annually.

"For the same reasons, in addition to ordinary errors, another type of error occurs. The Revenue and Taxation Code requires a penal assessment (Section 501, et seq.) when the taxpayer fails to file. This penal assessment, which may go as high as ten times the value of the property, must be based on the value of the property. The brief time allowed for the compilation of some 9000 penal assessments does not permit us to examine the property before levying the penal assessment. As a result, instead of having a penalty of 50, 100 or 200 per cent, we find, after a taxpayer's complaint and verification by our audit division, that we may have a penal assessment of 500 to 1500 per cent.

"Since the law requires all property to be assessed uniformly and proportionately, we believe that penalties should also be uniform and proportionate. Where careful examination by our auditors shows an excessive, disproportionate penalty, it is due to our erroneous valuation of the property itself.

"After the aforementioned erroneous assessment and subsequent penalties based thereon are brought to our attention and verified, said errors are corrected by us for the current year, and the taxpayer is required to pay the adjusted amount for that year. In such a case the Board of Supervisors is asked to cancel the original erroneous arbitrary assessment and the penalties based thereon.

"Request is hereby made for an opinion as to whether this procedure is legal and whether the Board of Supervisors has the power to cancel such assessments."

O P I N I O N

Section 4986 of the Revenue and Taxation Code provides, in part, as follows:

". . . All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be cancelled by the auditor on order of the board of supervisors with the written consent of the district attorney if it was levied or charged:

"(a) More than once.

"(b) Erroneously or illegally . . ."

The above section when contained in the Political Code was interpreted in the case of

Montgomery-Ward & Co. v. Welch,
17 Cal. App. 2d 127, at 131,

where the court said:

"With respect to the remedy available to a taxpayer there is an obvious distinction between a mere overvaluation of property in an assessment and a double, erroneous or illegal assessment. (Brenner v. Los Angeles, 160 Cal. 72 [116 Pac. 397]; Associated Oil Co. v. County of Orange, 4 Cal. App. 2d 5 [40 Pac. 2d 887].) In the case of an erroneous or illegal assessment the board of supervisors may refund the amount paid under protest or cancel the entire assessment under the provisions of section 3804 or section 3804a of the Political Code. Those sections are available, where the property is assessed 'more than once, or erroneously or illegally', in the absence of any previous application to or showing before the board of equalization (Rittersbacher v. Board of Supervisors, 220 Cal. 535 [32 Pac. 2d 135]), but they are available only where the assessment

"is absolutely void. (Graciosa Oil Co. v. Santa Barbara, 155 Cal. 140 [99 Pac. 483, 20 L.R.A. (N. S.) 211].)"

See, also,

Southern California Hardwood & Manufacturing Company v. City of Los Angeles, 49 Cal. App. 712; 24 Cal. Jur. 320.

From the foregoing citations of authority it clearly appears that the remedy provided by Section 4986 cannot be availed of in a situation of this kind. As pointed out in the Montgomery-Ward & Company case, there is an obvious distinction between an overvaluation of property by an assessment and an erroneous or illegal assessment.

You apparently have been proceeding under the theory that where there is an overvaluation due to an error, the provisions of Section 4986 of the Revenue and Taxation Code may be used to correct such an error, but the law does not permit this. Overvaluations may not be corrected under the procedure outlined in Section 4986.

It is therefore my opinion that the procedure set out in your request is illegal and that the Board of Supervisors has not the power to cancel assessments of this type under the provisions of Section 4986 of the Revenue and Taxation Code.

Respectfully submitted,

JNO. J. O'TOOLE

CITY ATTORNEY.

TO: THE ASSESSOR
101 City Hall

WAD

4169

July 21, 1948

SUBJECT: STREET IMPROVEMENT ASSESSMENTS, USE OF CITY FINANCIAL AID TO REDUCE TOTAL ASSESSMENT.

Dear Sir:

We have your request for an opinion as follows:

"I have been directed by the Streets Committee to request from you a legal interpretation of the third paragraph of Section 6 of the San Francisco Street Improvement Ordinance of 1934.

"The Committee is also desirous of knowing whether or not it is within their power to rewrite a section of an ordinance providing for street work, to show what amount of money, if any, will be contributed as city aid toward the assessment against each piece of property within the area designated to bear the cost of the improvement."

OPINION

Section 6 of Part 1 of the Street Improvement Ordinance of 1934 reads as follows:

"Section 6. Said Director may, if he deem it advisable, and when there is an unexpended and unencumbered balance in any fund in the City and County Treasury which has been appropriated for such general purpose, and the written consent of the Chief Administrative Officer and Controller has been obtained, recommend to the Supervisors that not to exceed two-thirds of the expense of any of the work mentioned in this ordinance shall be paid out of said Treasury from such unexpended and unencumbered balance. Said Director shall state the fact of such intended recommendation in his order declaring his intention to recommend that the work be done, specifying in such order the amount so to be recommended for payment from the Treasury.

"If the Supervisors follow the recommendation in whole or in part, they shall appropriate for such purpose, in the ordinance ordering the work, the amount so recommended, or such part thereof as they shall consent to; provided, however, that no such appropriation shall be made until the provisions of Section 86 of the Charter of said City and County shall have been complied with. The amount so to be paid from the Treasury shall be payable at such time or times as shall be specified in the notice calling for sealed proposals for the work.

"Whenever any of the expense of such work is so ordered to be paid out of the Treasury said Director in making up the assessment hereinafter provided for, shall, unless the Supervisors in said ordinance otherwise provide, and except as otherwise provided in Subdivision 4, Section 24, of this ordinance, first

deduct from the whole expense of such work the amount so ordered to be paid out of the Treasury, and shall assess the remainder of said expense upon the parcels of land liable to be assessed therefor in the manner hereinafter provided.

"This section shall not be construed as a limitation upon the power of the Supervisors to make an appropriation from the Treasury at any other time or in any other manner to pay not to exceed two-thirds of the cost of any work mentioned in this ordinance."

Under Section 6, the Director of Public Works may, with the consent of the Chief Administrative Officer and the Controller, recommend to the Board of Supervisors that an ordinance be passed appropriating from the Treasury monies to defray the costs of proposed street work. The only limitation on this authority is that the Director shall not recommend an appropriation of money in excess of two-thirds of the cost of the work which he orders done.

The third paragraph of Section 6, however, provides a procedure to be followed by the Director whenever any of the expense of such work is so ordered to be paid out of the Treasury. When making up the assessment, he must first deduct from the whole expense of such work the amount so ordered to be paid out of the Treasury and then assess the remainder of the expense upon parcels of land liable to be assessed therefor. It is apparent from reading said paragraph that this method of using monies paid out of the Treasury is not the only manner in which said monies may be used. The underscored words in said paragraph give to the Supervisors, when passing the ordinance approving the street work proposed by the Director and making the appropriation recommended, the authority to distribute the monies in any manner they may deem fit. The last paragraph of said section expressly limits the power of the Supervisors in only one particular and that is that their appropriation may not exceed two-thirds of the cost of the work proposed.

Therefore, the answers to your request may be stated as follows:

(a) Under the third paragraph of said section, the Supervisors in passing the ordinance in connection with the use of City financial aid are not limited to the method imposed upon the Director; that is, the Supervisors may direct that the City aid be distributed in any manner they deem proper.

(b) In answer to your second inquiry, the Supervisors in passing the ordinance may designate the amount of City aid be appropriated toward the assessment against particular parcels of property within the area designated to bear the cost of the improvement. This may be done by the Supervisors in the passing of the original ordinance approving the work or at any other time to show what amount of money, if any, will be contributed as City aid toward the assessment against each piece of property within the area designated to bear the cost of the

improvement so long as the total appropriation does not exceed two-thirds of the cost of the work mentioned in the ordinance.

Respectfully submitted,

CITY ATTORNEY

To: Board of Supervisors
cc: Mayor

CWD

4170

July 21, 1949

SUBJECT: HEALTH SERVICE SYSTEM - WHO SHALL DEFRAY EXPENSES OF ELECTION OF MEMBERS OF BOARD.

Dear Sir:

We have your request for an opinion as follows:

"Section 172.1 of the Charter dealing with the Health Service System provides as follows:

"1. 'Members of the Board shall be nominated by written nomination of twenty members filed with the Registrar of Voters not earlier than April 1 nor later than April 15 of each year. The Registrar of Voters shall prepare ballots and shall furnish the same to all members of the system between April 15 and April 25, and shall receive the ballots between April 25 and May 7, and canvass and certify the results on May 8.'

"2. 'All expenses of the system shall be borne exclusively by funds of the system and the City and County shall not appropriate or contribute funds in any manner for the purposes of the system hereby established and provided.'

"We have interpreted the second extract of the section quoted above as meaning that the Registrar of Voters shall bill the Health Service System for all of the Registrar's costs in connection with the handling of the Health Service elections. We interpret the provision to mean that the Registrar shall be reimbursed for the salaries of all permanent and temporary employes for the time devoted to mailing of the ballots, receiving the ballots and checking names against rosters, canvassing of the vote and other similar activities in connection with the election.

"Will you kindly advise this office if our interpretation is correct."

OPINION

From a careful reading of Section 172.1 of the Charter it appears that the intent of the framers thereof was to make the Health Service System entirely self-sustaining, for therein is found a provision requiring that the premium on the bond demanded of each member of the board "shall be paid out of the funds of the system"; a provision that the board can make provisions for the participation by dependents of members, retired municipal employees provided that such participation "shall be without cost to the City

and County;" a provision that the board shall have control of the administration and investment of funds of the system; a provision that members of the system "shall have and possess no claim or recourse against any of the funds of the municipality" by virtue of any medical plan adopted by the board; a provision that the claim or recourse of any member "shall be limited solely to the funds of the system;" and finally the unequivocal statement that "all expenses of the system shall be borne exclusively by the funds of the system and the City and County shall not appropriate or contribute funds in any manner for the purposes of the system . . ." (underlining mine).

It was upon a consideration of the quoted provisions that this office based a previous opinion that the Health Service System is a quasi public body and that the City and County could not contribute jointly with the employees of the Health Service System to Retirement System. Opinion #2097 (1938 Series).

The language of the section underlined above is very clear and all-embracing. You are advised, therefore, that it is my opinion that the Registrar must bill the System for his costs in handling the elections of the System.

Respectfully submitted,

JOHN J. O'CONNOR

City Attorney.

To: Chief Administrative Officer.

CHA

4171

July 30, 1948

SUBJECT: RIGHT OF W. W. CHAPIN TO ACT AS PRESIDENT OF CALIFORNIA STREET RAILWAY COMPANY AND AT THE SAME TIME TO SERVE AS A MEMBER OF CITY PLANNING COMMISSION.

Dear Sir:

You have directed to me an inquiry as to whether Mr. W. W. Chapin may act as President of the California Street Railway Company, and at the same time serve as a member of the City Planning Commission.

O P I N I O N

Mr. Chapin was appointed by you as a member of the City Planning Commission and is now serving as such. Subsequent to his appointment he was appointed to the Board of Directors of the California Street Railway Company and is now serving as President of that company.

I cannot find any prohibition in the Charter against his occupying the two positions. The duties of the City Planning Commission are set forth in Sections 116, et seq., of the Charter. These sections make recommendations of the City Planning Commission in most cases advisory upon the Board of Supervisors, and before their recommendations can be effective, they must be approved by ordinance or resolution of the Supervisors. True, in Section 116 of the Charter they are charged with the duties of making a master plan which shall include maps, plans and charts supporting the recommendations of the Commission for the coordinated and harmonious development in accordance with the present and future needs of the City and County as well as land outside the boundaries thereof, which, in the opinion of the Commission, bears a relation thereto. It is provided in the next paragraph of said section that the master plan shall show the general location, character and extent of existing and proposed street railway, bus, railroad, air, water and other transportation routes and terminals, and that said plan shall also include proposals for the acquisition, extension, widening, narrowing, removal or change in the use of any public ways, roads, grounds or open spaces, buildings or structures. All of such plans shall be sent to the Board of Supervisors or to the Mayor.

Section 116.1 of the Charter provides that no ordinance or resolution which deals with the acquisition, extension, widening, relocation, vacation, abandonment, sale or change in the use of any public way, transportation road, ground or open space shall be adopted by the Board of Supervisors until such ordinance or resolution shall have first been referred to the City Planning Commission and a report had thereon as to whether or not the proposed action is in conformity with the master plan. Aside from the instances indicated in the Charter section regarding changes in transportation roads, I cannot see that said Commission has any jurisdiction whatsoever over any railway system in the City.

True, if it was a question of getting a new franchise and using streets for railway purposes, it might be a change in the use which would have to be reported on by the Planning Commission, but no such situation arises at present insofar as the California Street Railway is concerned and therefore I do not think that there is any incompatibility between the position as a member of the City Planning Commission and a Director or President of a privately-owned street railway.

The California Street Railway Company is a privately-owned street railway and the City has no jurisdiction over its road or over the fares that are charged for servicing the public. The road is fixed by the operating permit heretofore issued to the company and could only be changed by a supplemental permit or a new franchise, neither of which are being considered at the present time. The rate of fares which will be charged by the railway company is entirely within the jurisdiction of the State Railway Commission, now the State Public Utilities Commission, and nothing that the City Planning Commission could do or say would have any influence on the Commission to any greater extent than would the recommendation or protest of any private individual.

There is nothing in the Charter providing for any special qualification or disqualification of a member of the Commission and when we come to look at Section 222 of the Charter, which deals with prohibited practices of officers and employees, I can see nothing in this Section which would disqualify Mr. Chapin. The disqualifications are set up in the first sentence of this Section and are as follows:

> "No member of any board or commission shall accept any employment relating to the business or the affairs of any person, firm or corporation which are subject to regulation by the board or commission of which he is a member. No supervisor and no officer or employee of the city and county, shall be or become, directly or indirectly, interested in, or in the performance of, any contract, work, or business, or the sale of any article, the expense of which, or consideration of which, is payable from the treasury."

True, there is a general rule of law, irrespective of statutory enactments, to the effect that a person cannot occupy incompatible offices. The New York Supreme Court in the case of Macrum v. Board of Supervisors, etc., 252 N.Y. Sup. 546, has said:

> "Incompatibility between offices is inconsistency in functions such that the two ought not to be held by the same person on account of antagonism which would result."

On the same subject, the Supreme Court of Minnesota in State v. Sword, 196 N.W. 467, has said:

> "Public offices are incompatible when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty so that the incumbent of one cannot discharge with fidelity and propriety the duties of both."

I can find no case that would bring the office of City Planning Commissioner and the office of President of a privately-owned railway company operating in San Francisco as being incompatible offices.

I further understand that recently a hearing was held before the Judiciary Committee of the Board of Supervisors where Mr. Chapin's position was given very careful consideration. At that time in response to the request of the Judiciary Committee, Mr. Chapin appeared and made a full statement as to his connection with the railway company. He stated that he had no financial interest at all in the company and whether the company made money or lost money it would not reflect in any way upon his personal income. He admitted that he had some shares of stock in the company which were given to him merely to enable him to qualify as a Director, but these shares of stock were held only in trust and that he had no beneficial interest in them.

Supplementing this statement, I have been furnished by Mr. Chapin with a letter written by Mr. John Gallois from Paris, France, in which he responds to a cable sent to him by Mr. Chapin's attorney. In his letter Mr. Gallois states positively that Mr. Chapin is acting without compensation for services to the railway company, and he is only occupying the position at the request of citizens who are interested in the maintenance of this additional transportation system for San Francisco. I quote from a paragraph of the letter from Mr. Gallios to Mr. Chapin's attorney, which is as follows: "In order to comply with the company's by-laws and also to abide with Mr. Chapin's desires not to own any stock, I was obliged to transfer 100 shares into his name before he could be elected President. Mr. Chapin has only a record interest in the stock, receives no dividends or any rights or other benefits from these shares directly or indirectly, and the shares are now and always have been (except during the transfer period after being endorsed by Mr. Chapin) under my possession and direction and held in safe keeping for me by my bankers, Leib, O'Connor and Co., in the Russ Building."

It would therefore appear that Mr. Chapin has no direct financial interest in the California Street Cable Railway Company and it appears to me that the prohibition contained in Section 222 of the Charter against having or acquiring an interest in any contract or in any franchise, right, or privilege granted by the City and County, means a financial interest. From all that I have been able to gather from a rather complete investigation of the matter leads me to believe that Mr. Chapin has no financial interest in the California Street Cable Railway Company. I especially direct your attention to the case of Capitol Gas Company v. Young, 109 Cal. 140, wherein the Supreme Court

of this State held that although the Mayor of Sacramento was a stock holder in the gas company, the mere fact that the company made profit by the fulfillment of its obligation to supply the City of Sacramento with gas, this fact did not in itself prevent the payment for gas furnished to the City of Sacramento. While this case was decided in September of 1895, it has been cited with approval not only by our own Appellate Courts but also by the courts of many other states, and briefly, it means where an obligation is placed by law upon an official, he is not subject to the same rules and regulations as an official who might become interested in an ordinary contract which the city might enter into.

Therefore, at the present time, I can see no incompatibility between Mr. Chapin's position as President of the California Street Cable Railway Company and his position as a member of the City Planning Commission. However, in looking into the future, it might be that if the City should determine to purchase the properties of the California Street Cable Railway Company, Mr. Chapin would become subject to the provisions of Section 222 of the Charter, but this procedure is not contemplated at the present time and could only be accomplished by the issuance of bonds to provide the purchase price for the properties of the railway company. When we come to cross this bridge, it is time enough to give it consideration and then determine whether Mr. Chapin has any financial interest in the railway company, which he will not have unless conditions materially change.

You are therefore advised that in my opinion Mr. Chapin is qualified to hold the office of City Planning Commissioner and at the same time to act as President of the California Street Cable Railway Company.

Respectfully submitted,

CITY ATTORNEY.

To: The Mayor.

cc: Board of Supervisors

JJO'T

4172

July 30, 1948

SUBJECT: SALARY STANDARDIZATION SURVEY EVERY FIVE YEARS.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

"Section 151 of the Charter providing for standardization of compensations provides:

"'Not later than January 15, 1944, and every five years thereafter and more often if in the judgment of the Civil Service Commission or the Board of Supervisors economic conditions have changed to the extent that revision of existing schedules may be warranted in order to reflect current prevailing conditions, the Civil Service Commission shall prepare and submit to the Board of Supervisors a schedule of compensations as in this section provided'.

"The Commission submitted a proposed schedule of compensations on or before January 15, 1944, and in the intervening years a new salary standardization proposal has been submitted and adopted annually by the Board of Supervisors.

"The Commission would appreciate your advice as to the proper interpretation of the above quoted language. Will we be required to submit still another salary standardization proposal on or before January 15, 1949, since that is five years subsequent to the date of January 15, 1944, even though salary standardization proposals as provided in section 151 of the charter have been submitted by the Commission and adopted by the Board of Supervisors annually since that date?"

O P I N I O N

Inasmuch as that portion of Section 151 upon which you are asking for an opinion is fully set forth in your request, I will not repeat it here.

The paragraph contained in your request which deals with the question of salary surveys divides them into two types, (1) those that must be held every five years, and (2) those that are discretionary, based upon the decision of either the Civil Service Commission or the Board of Supervisors.

Both of these classes are distinct. This Charter section provides that in all events a salary survey must be held every five years; the section then further provides that whenever the Civil Service Commission or the Board of Supervisors determine in their discretion that a revision of existing schedules is warranted in order to reflect current prevailing economic conditions, then a survey shall be conducted.

I advise you, therefore, that, inasmuch as the surveys made in 1945, 1946, 1947 and 1948 are the type that depended upon some affirmative action of the Board of Supervisors or the Civil Service Commission, they in no way eliminated the necessity of having a survey reported five years after January 15, 1944, or before January 15, 1949.

Respectfully submitted,

CITY ATTORNEY

To: Civil Service Commission

BJW.Jr

August 4, 1948

IN RE: RIGHT OF POLICE COMMISSION TO REDUCE WORKING HOURS OF MEMBERS OF POLICE DEPARTMENT TO AN AMOUNT BELOW 44 HOURS PER WEEK.

Dear Sir:

I have your letter, which reads as follows:

REQUEST

"A change in the basic week of service for Members of the Police Department is under consideration.

"Section 35.5½ of the Charter of the City and County of San Francisco, as amended, effective July 1st, 1948, authorizes a basic week of service of not more than forty-four hours.

"Subdivision (b) of Section 35.5½ reads as follows:

"'The basic week of service for each member shall be not more than forty-four (44) hours and the annual compensation set forth in section 35.5 of this charter shall be based upon said basic week of service.'

"The Police Department, under the provisions of Section 35 of the Charter is 'under the management of a Police Commission.'

"Is the Police Commission, under the foregoing Charter Provision, authorized to reduce the present forty-four hour week of service without a reduction in the annual compensation provided for the various ranks of the Department?

"Thanking you for an early opinion as to the legality of this contemplated change, I am

Very truly yours,
/s/ MICHAEL E. MITCHELL,
Chief of Police."

Supplemental to the letter of the Chief of Police I have the request of Supervisor McMurray for an opinion upon the same subject, as follows:

"Reference is made to paragraph b, Section 35.5½ of the Charter. It is respectfully requested that we have your opinion as to whether the Police Commission has the authority

"by virtue of said paragraph b to place working personnel on a work-week of less than forty-four hours.

"It will be greatly appreciated if we can have this opinion as quickly as possible.

Yours very truly,

/s/ P. J. McMURRAY
PATRICK J. McMURRAY,
Supervisor."

OPINION

Subdivision (b) of section 35.5½ of the charter, as amended in 1948, reads as follows:

"(b) The basic week of service for each member shall be not more than forty-four (44) hours and the annual compensation set forth in section 35.5 of this charter shall be based upon said basic week of service."

This particular subdivision of the section mentioned would seem to place a limitation upon the powers of the Police Commission to limit the work of those serving in the uniformed ranks of the Police Department to not more than forty-four hours per week. Note the language - "not more." Certainly, there is no power in the Police Department to work its uniformed forces more than forty-four hours a week, except in cases of emergency. Therefore, all we must determine is: "Can the Police Commission reduce the basic hours which make up a week's service?"

Section 35 of the charter places the entire control of the Police Department under the Police Commission, and unless there is some prohibition contained in the charter (which I do not find), the Commission has the complete control of the working conditions of the persons serving in the Department. True, we have certain limitations -- the work-week of a member of the uniformed forces cannot exceed forty-four (44) hours; but I can find nothing contained in the charter which states that it must be forty-four (44) hours. Therefore, I am of the opinion that if, in the judgment of the Police Commission, conditions warrant a shorter work-week, and if the Commission should conclude that the ordinary police duties of an individual member of the Department can be performed within a period of less than forty-four hours in any particular week, without curtailment to the ordinary police service to which the public is entitled, it may, by rule of the Commission, provide for a week of less than forty-four hours. The Commission should, however, give most careful consideration to this matter before making such a rule, and should

assure itself that the requisite police service can be given to the public.

There is nothing in this opinion which can be taken as meaning that the Police Commission has unlimited powers in reducing the hours of service of the members of the Police Force. Common sense will dictate the fact that a police officer must give a reasonable day's service for a reasonable day's pay, but I am quite sure, if there is no abuse of the discretion which we all must admit is vested in the Police Commission in the government of its employees, that the Commission has the power to provide for a shorter work-week than forty-four hours; provided it does not interfere with the duties of a member of the Department which the law expects such a member to perform. You are advised accordingly.

Very truly yours,

JOHN J. O'TOOLE, City Attorney.

TO: MICHAEL E. MITCHELL, Chief
of Police
Hall of Justice
Kearny and Washington Sts.
San Francisco.

ccs: SUPERVISOR PATRICK J. McMURRAY
c/o Board of Supervisors
City Hall, San Francisco

BOARD OF SUPERVISORS
City Hall, San Francisco

HONORABLE ELMER E. ROBINSON,
Mayor of San Francisco
City Hall, San Francisco

4174

August 12, 1948

SUBJECT: ARE MUNICIPAL RAILWAY FARES, THE SUBSIDIZING OF OPERATIONAL DEFICITS FROM TAX FUNDS AND THE SALE OR LEASE OF THE MUNICIPAL RAILWAY, PROPER SUBJECTS FOR DECLARATION OF POLICY

Gentlemen:

You have requested an opinion as follows:

"You are hereby respectfully requested to advise the Judiciary Committee as to whether or not the following questions are proper for submission to the electorate as declarations of policy - in other words, if said questions meet with a majority affirmative response, has the Board of Supervisors legal power to comply with the mandates thereby expressed?

1. Shall Municipal Railway fares be increased to such an amount as will yield a sum sufficient to meet all of its obligations?

2. Shall the Municipal Railway's operations be subsidized from tax funds if necessary to meet all of its obligations?

3. If a raise in fare or subsidy from tax funds be necessary to operate the Municipal Railway, do you favor sale or lease of the Municipal Railway properties?"

O P I N I O N

1. Section 130 of the Charter relates to the matter of rates and fares to be charged by public utilities of the City and County. By this section the power to fix the amount of these charges is reposed in the Public Utilities Commission, subject to approval by the Board of Supervisors.

The amount of the fares of the Municipal Railway is therefore not a subject which the Board of Supervisors may regulate by ordinance or otherwise. The Board performs only a limited function in this regard, the primary rate fixing power being vested in the Public Utilities Commission.

It would therefore be beyond the power of the Board of Supervisors to enact an ordinance as required by Section 179 of the Charter, to put into effect any mandate of the electorate in response to Question No. 1 above stated, and you are advised that this question is not a proper one for submission to the electorate as a declaration of policy.

2. The power to determine whether fares of the Municipal Railway shall be fixed at amounts sufficient to pay all expenses or shall be at a less amount, the deficit being provided by tax levy, is reposed by Section 130 of the Charter in the Public Utilities Commission, subject to the approval of the Board of Supervisors.

In this regard, Section 130 states as follows:

> "Rates for each utility shall be so fixed that the revenue therefrom shall be sufficient to pay, for at least the succeeding fiscal year, all expenses of every kind and nature incident to the operation and maintenance of said utility, together with the interest and sinking fund for any bonds issued for the acquisition, construction or extension of said utility; provided that, should the commission propose a schedule of rates, charges or fares for said utility which shall not produce such revenue, it may do so with the approval of the board of supervisors, by a two-thirds vote and it shall thereupon be incumbent to provide by tax levy for the additional amount necessary to meet such deficit."

The Board being powerless to put such a declaration of policy into effect by ordinance, you are therefore advised that Question No. 2 is not a proper one for submission to the electorate as a declaration of policy.

3. As to your question relating to the sale or lease of "Municipal Railway properties", I assume that by this expression you mean the entire public utility of the City and County designated in Section 122 of the Charter as the San Francisco Municipal Railway.

Section 123 of the Charter requires, before it shall go into effect, a ratification by the electorate of any ordinance or other measure involving the lease or sale of the Municipal Railway. It does so in the following language:

> "The Board of Supervisors shall have power to lease or sell any public utility or any part thereof; provided that any ordinance or other measure involving the lease or sale of any public utility or part thereof, except as provided in sections 92 and 93 of this charter, or any ordinance granting any new franchise for the operation of any public utility whose franchise has expired, or is about to expire, must be referred and submitted to a vote of the electors of the city and county at the election next ensuing not less

> than sixty days after the adoption of such ordinance, and shall not go into effect until ratified by a majority of the voters voting thereon."

You will note that the referendum so provided is not the power reserved to the electorate by Article IV, section 1 of the Constitution of California or by Section 179 of the Charter.

The referral to the electorate provided by Section 123 on lease or sale of a public utility is an integral part of the process of enactment of any measure for such a purpose. Without ratification of the electorate by such referral, such a measure shall not go into effect.

The provision of Section 179 respecting declarations of policy requires discussion here. This provision is as follows:

> "Any declaration of policy may be submitted to the electors in the manner provided for the submission of ordinances; and when approved by a majority of the qualified electors voting on said declaration, it shall thereupon be the duty of the Board of Supervisors to enact an ordinance or ordinances to carry such policies or principles into effect, subject to the referendum provisions of this Charter."

I am of the opinion that the last phrase, "subject to the referendum provisions of this charter", merely reserves the right of referendum guaranteed in the Charter and makes it clear that this paragraph is not intended to remove that right.

As to the provisions of Section 123, they set up a specific method by which the question of lease or sale of a public utility may be submitted to the electorate by action of the Board. Section 123 also provides a safeguard of minimum time between action by the Board on an ordinance for lease or sale of a utility and vote of the electorate. This minimum time is more strict than that provided in Section 179 for ordinances subject to its provisions. The minimum time under Section 123 is sixty days, while under Section 179 a minimum time is provided of thirty days from the call of any special election for the purpose, but no minimum time is provided as to a general election.

I believe that Section 123 is a special provision of the Charter for the purpose of providing a special method of submission to the electorate of the important subjects of the section. These subjects are not within the general legislative powers of the Board to which Section 179 refers, but are covered by a special section

requiring both the Board and the electorate to participate in the legislative process. This special procedure is not meant as a mere alternative to a less restrictive process, but is to be regarded as designed for exclusive use in the field of legislation to which it is devoted.

This interpretation of Sections 123 and 179 accomplishes the purpose of the specific legislation contained in Section 123. Any other interpretation fails to do so.

I therefore advise you that Question No. 3 is not a proper one for submission to the electorate as a declaration of policy.

I call your attention also to the fact that an opinion related to subject matter similar to parts of this request was given to you under date of April 4, 1946.

Respectfully submitted,

CITY ATTORNEY

To: Judiciary Committee - Board of Supervisors

WP
CC: Mayor

4175

August 19, 1948

SUBJECT: DEFINITION OF "CORNER LOT" AS TERM IS USED IN PART II, CHAPTER II, ARTICLE 4, SECTION 99(d) OF THE SAN FRANCISCO MUNICIPAL CODE.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

REQUEST

"A building application is before the Department of City Planning for approval, and before the application can be approved by this department, an opinion from your office will be necessary. Following are the facts in the case:

"(1) Regulations effecting the case:

Minimum lot size Ordinance No. 4162, Section 99, Part (d)

"'d) Corner Lots - First Residential Districts
In any area previously subdivided in a First Residential District, the area lying within 100 feet of the corner of of a block, measured along each street from such corner, can be resubdivided into lots having a minimum width of 25 feet and a minimum depth of 70 feet.'

"(2) Description of Property:

Commencing at a point on the easterly line of 39th Avenue a distance thereon 93 feet southerly from the southerly line of Noriega Street, as widened, running thence southerly 25 feet along said line and for a depth easterly of 90 feet. It is to be noted that only the first seven feet of the lot are within 100 feet of the corner. Part (c) of Section 99 specifies a minimum area of 2500 square feet for resubdivided lots except as provided in part (d).

"Opinion necessary:

(1) When only a portion of a lot lies within 100 feet of a corner, can the

"entire lot be considered a corner lot as described in Part (d) of Ordinance No. 4162?

"Your cooperation in this matter is appreciated."

O P I N I O N

Part II, Chapter II, Article 4, section 99(d) of the San Francisco Municipal Code provides, in part, as follows:

> "(d) Corner Lots - First Residential Districts
> In any area previously subdivided in a First Residential District, the area lying within 100 feet of the corner of a block, measured along each street from such corner, can be resubdivided into lots having a minimum width of 25 feet and a minimum depth of 70 feet."

It will be noted that the above definition of "corner lots" is limited in area to "the area lying within 100 feet of the corner of a block." It is then provided that such area can be resubdivided into lots having a minimum width of 25 feet and a minimum depth of 70 feet.

Here, a lot is attempted to be laid out, under the provisions for a corner lot, where only 7 feet of the lot would be within 100 feet of the corner of a block; the rest, and major portion of the lot would extend beyond the point of 100 feet from the corner.

Reasonably construing the heretofore quoted definition of "corner lots," I do not believe that where only 7 feet of a lot would be within 100 feet of the corner of a block, that any such lot could be considered a "corner lot."

You are thus advised in connection with your inquiry as submitted.

Respectfully submitted,

CITY ATTORNEY.

TO: DEPARTMENT OF
CITY PLANNING
100 Larkin St.
San Francisco 2

NSW

4176

August 19, 1948

SUBJECT: PROPOSED CHARGE TO BE MADE BY THE CITY FOR POLES MAINTAINED BY PACIFIC GAS AND ELECTRIC COMPANY ALONG STREETS.

Dear Sir:

This is in reply to your letter in which you state the following:

> "The Finance Committee of the Board of Supervisors has requested me to ascertain from you whether the City may impose a license fee on the poles of the Pacific Gas and Electric Company."

This matter was discussed in our office with Mr. Errol Rosenthal and we assumed that Mr. Rosenthal had, in turn, taken up the matter with you.

O P I N I O N

It is our conclusion that such a charge cannot lawfully be imposed.

We rest this conclusion upon the terms of the franchise under which Pacific Gas and Electric Company now operates in San Francisco. It appears that this utility, under the terms of its franchise for the distribution of electricity, has already paid a substantial sum and now is paying a further agreed sum of money based upon percentage of revenue for this very privilege.

It appears that, under

Constitution of California,
Article XI, Section 19,

as it read prior to its amendment effective October 10, 1911, Pacific Gas and Electric Company possessed, and still possesses a franchise for the supply of "gaslight or other illuminating light." The distribution of electricity for power and heat was not embraced through such constitutional franchise.

In Ordinances Numbers 413 and 414, (Series of 1939), franchises were granted by the City and County of San Francisco to Pacific Gas and Electric Company for the distribution of gas (Ordinance Number 413), and for the distribution of electricity (Ordinance Number 414), for purposes beyond those of light and therefore extending without the confines of the constitutional franchise. Inasmuch as the use of poles is involved only in the electricity franchise, we confine our attention to the latter.

Ordinance Number 414 (Series of 1939), heretofore mentioned, granted a franchise to Pacific Gas and Electric Company to distribute electricity in the City and County of San Francisco for all purposes exclusive of the purposes mentioned in Section 19 of Article XI of the State Constitution, as that section read prior to its amendment in October, 1911. (The foregoing is a synopsis of the granting clause of the ordinance.)

The period of the franchise is until surrender or abandonment by the grantee with the consent of the lawful authority having jurisdiction, or until the City shall acquire, through purchase or eminent domain, all property used and useful in the exercise of the franchise and situate within the territorial limits of the City, or until forfeited by non-compliance with the terms of the franchise.

As appears from the requirements of the Ordinance and from subsequent documents, Pacific Gas and Electric Company, upon acceptance of the franchise, paid the sum of $200,000 for the franchise and agreed to pay 1/2 of 1 percent of gross revenue from the sale of all electricity within the City.

The granting section of the Ordinance expressly recites that the right is given "to construct and use in the streets of said city and county all poles, wires, conduits and appurtenances necessary and proper therefor" (in the exercise of the franchise) "and likewise to use all electric poles, wires, conduits and appurtenances which are now in place or hereafter may be placed in said streets."

The essence of a franchise is, of course, the right to use public property. Here, it definitely appears that the Company has both acquired and paid for this right.

It is true, as held in

City of St. Louis v. Western Union Tel.Co.(1892)
148 U. S. 92, 37 L. Ed. 380,(on rehearing
149 U. S. 465, 37 L. Ed. 810),

that the true nature of the charge contemplated here is one for the use of public property and that such charge would be neither a privilege or a license tax, or indeed any tax at all. Therefore, the inhibition of

Constitution of California,
Article XIII, Section 14,

imposing a tax for State purposes upon the property of a public utility, with the proviso that there shall be no other form of tax or license charge subjecting such companies to a higher rate than ordinary business corporations, probably does not apply.

We rest our views, therefore, solely upon the ground that the City and the Company already has agreed as to the charge for the use of the public property occupied by the poles.

In

City and County of San Francisco v.
Market Street Railway Company, (1937),
9 Cal. (2d) 743,

the plaintiff endeavored to collect a "license tax" at the rate of $15.00 per annum per car, which was imposed by ordinance and under authority of a state law which authorized such license tax.

Civil Code, Section 508.

The City argued that the provision of

Constitution of California,
Article XIII, Section 14,

as it stood prior to its amendment in 1933 (See Treadwell's Edition, 1931), enacting that the tax thereby imposed upon a public utility should be in lieu of all other taxes, except such amounts "agreed to be paid or required by law to be paid for any privilege or franchise" authorized the imposition of this license tax. The Court ruled that the words "required by law to be paid" applied only to the purchase money by which the franchise was acquired including subsequent payments to be made as additional cost of acquisition.

In 1933, the constitutional section was amended so as to change the scheme of taxation from one by measurement upon earnings to direct valuation and assessment upon property. The same proviso quoted above as to the amount, "agreed to be paid or required by law to be paid" is incorporated in the 1933 amendment. There can be no doubt that these words would be interpreted in the same manner, under the 1933 amendment, as in the Market Street Railway Company case and that the City would have no right to impose a so-called license tax based upon a unit charge per pole.

Therefore, whether the matter is considered from the standpoint of a charge for the use of public property, or from the standpoint of a so-called license tax, it is our conclusion that the proposed legislation would be invalid.

Respectfully submitted,

CITY ATTORNEY

To: Chief Administrative Officer

ADT

4177

August 19, 1948

SUBJECT: POWERS OF BOARD OF PERMIT APPEALS

Gentlemen:

This office is in receipt of your request for an opinion reading as follows:

REQUEST

"The Board of Permit Appeals has many times reversed the denial of the granting of a building permit by this office during the past several years. Among such cases were a number which had been denied because the provisions of the State Housing laws had been violated. In such cases we had denied applications for permits. After reversal of our denial by the Board of Permit Appeals we granted the permits.

"We now desire to be advised with regard to whether the Board of Permit Appeals has the right to reverse our decision where there has been a clear violation of the provisions of the State Housing laws."

OPINION

The foregoing request is restricted to the provisions of the State Housing law. However, because of the importance of securing a determination concerning all of the powers of the Board of Permit Appeals, I shall undertake to render an opinion covering not only the exact question asked but also the powers of the Board of Permit Appeals generally.

The Board of Permit Appeals derives its powers from Section 39 of the San Francisco Charter. The pertinent portion of Section 39 reads as follows:

"Any applicant for a permit or license who is denied such permit or license by the department authorized to issue same, or whose license or permit is ordered revoked by any department, or any person who deems that his interests or property or that the general public interest will be adversely affected as the result of operations authorized by or under any permit or license granted or issued by any department, may appeal to the board of permit

"appeals. Such board shall hear the applicant, the permit-holder, or other interested parties, as well as the head or representative of the department issuing or refusing to issue such license or permit, or ordering the revocation of same. After such hearing and such further investigation as the board may deem necessary, it may concur in the action of the department authorized to issue such license or permit, or, by the vote of four members, may overrule the action of such department and order that the permit or license be granted, restored or refused."

From an examination of the foregoing portion of Section 39 it appears that the Board of Permit Appeals has been given full power to grant a permit or license when an applicant has been denied such permit or license, and also to revoke the order of a department when a revocation by the department has occurred. There are no restrictions on the Board of Permit Appeals in these connections. The power given under Section 39 is clear and positive. There is no ambiguity in the language of this part of the section.

It is elementary that when the language of a statute is clear and unambiguous there is no necessity for construction.

23 Cal. Jur. 721.

However, the Board of Permit Appeals is merely a local board of an administrative nature, but with some judicial attributes and, as such, is a board which has discretionary powers.

Greif v. Dullea, 66 Cal. App. 2d 986, at 1006.

Lindell Co. v. Board of Permit Appeals, 23 Cal. 2d 303, at 314.

Nowhere in the section creating the Board of Permit Appeals is there any express or implied language authorizing the Board to decide a question contrary to an existing ordinance or to the general law.

Our local charter is replete with language indicating that the legislative power of the City resides and is vested in the Board of Supervisors. An extremely casual examination

of sections twelve, thirteen and fourteen of the charter indicates that there is only one legislative body in the City and County and that this body is the Board of Supervisors. If the Board of Permit Appeals had the power to cut across ordinances and general laws it would, without a doubt, be legislating. Such power would necessarily have the effect of vitiating and destroying provisions of local ordinances and general laws.

In regard to legislative powers it must be borne in mind that a statute must be read and construed as a whole and in harmony with the entire system of which it forms a part.

In re Marquez, 2 Cal. 2d 625;

Chilson v. Jerome, 102 Cal. App. 635, at 640.

Thus we must examine the whole charter and not just a part in order to come to a proper conclusion.

It is elementary, of course, that a charter provision is a statute of the state but restricted to the city or county adopting it. I point out further that the specific governs over the general. The law-making powers of the City and County of San Francisco have been specifically granted to the Board of Supervisors by charter. No law-making powers have been granted to the Board of Permit Appeals either expressly or by implication.

In connection with all of the foregoing, I am not unmindful of the provisions of Sections 8 and 8½ of Article XI of the Constitution giving the City and County full power in all its municipal affairs, and the many cases which have construed these provisions from time to time, but it should be noted that such power still exists but it has not been allocated to the Board of Permit Appeals.

From an examination of the Greif v. Dullea and Lindell Co. cases it clearly appears that the Board of Permit Appeals is restricted entirely to a determination of matters of discretion and that the Board of Permit Appeals cannot decide against a department unless the law is contrary to the views of the department, nor can it sustain a department where the law is to the contrary.

It is, therefore, my opinion that the Board of Permit Appeals, when acting, must do so in strict accordance with the provisions of local ordinances and all general laws, since, to do otherwise, would be to act as the law-making body of the

City and County, and also of the State of California when general laws are involved.

Very truly yours,

CITY ATTORNEY.

TO: DEPARTMENT OF PUBLIC WORKS,
VIA CHIEF ADMINISTRATIVE OFFICER
Attention: Mr. H. C. Vensano, Director.

CCS: Mr. Thomas H. Brooks, Chief Administrative Officer, City and County of San Francisco, City Hall.

HONORABLE ELMER E. ROBINSON, Mayor of the City and County of San Francisco, City Hall.

WAD

4178

August 23, 1948

SUBJECT: ALL CLEAR WHITE AREAS IN THE "ZONE MAPS," OTHER THAN CITY STREETS, ARE IN THE "SECOND RESIDENTIAL" DISTRICT.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

REQUEST

"A difficulty has arisen in connection with the interpretation of the maps which form part of the Zoning Ordinance, with reference to which we seek your advice.

"These maps show certain areas, other than city streets, 'unshaded,' i.e., without any cross-hatching or other symbol. The key indicates that this clear white represents the Second Residential District, and the map has been so interpreted with reference to city lands (other than streets) such as the water lands in the Lake Merced Area, Civic Center blocks, and so on.

"Railroad rights-of-way, in some sections of the Zoning District Maps, are cross-hatched or shaded the same as adjacent property. In other areas they are left clear white. The department has consistently ruled that such white areas must be treated as being in a Second Residential District.

"In making such rulings it has been assumed that the ordinance was comprehensive, i.e. that it applied to all property within the city. An Unrestricted District classification is provided in the ordinance and it has been assumed that if those who framed the original ordinance intended to exclude any property from the provisions of other zoning districts, such property would have been placed in the 'Unrestricted District' and would have been so indicated on the Use of Property Zone Maps. All white areas on the 'Zone Maps', other than city streets, have therefor been considered to be 'Second Residential.'

"Recently we disapproved a permit for a Foster and Kleizer billboard to be placed on a portion of the right-of-way of the Southern Pacific which lies between a street and a block of private property. The remainder of the block is in a First Residential District. The right-of-way in this instance is unshaded. The property across the street is in a Commercial District, and the applicant's claim is that the right-of-way is Industrial, and they have made a written request that we secure from you a legal opinion as to the zoning in such an instance.

"The files of the Zoning Division show that on several occasions in the past the Southern Pacific Company has itself applied for changes of zone of portions of its right-of-way. The fact that portions of the right-of-way actually carry industrial and commercial designations seems to impose the interpretation that, where these designations are omitted, the intention was to place it under the restrictions which apply to the Second Residential District, as far as any private use thereof is concerned.

"We consider the matter to be of great importance, since stretches of the right-of-way through residential areas would, if our interpretation has been wrong, be open to a wide variety of uses which are definitely inappropriate. At your convenience, we shall be glad to provide you with any further information that may be necessary."

O P I N I O N

The use of property zone maps is made a part of the zoning ordinance; and the use districts designated on the maps are thereby reorganized and established, as well as are the designations which accompany the said use of property zone maps.

As is specifically set forth in Part II, Chapter II, Article 1, section 2 of the San Francisco Municipal Code:

"Use Districts . . . . . .

". . . . . The use districts designated on zone maps 1 to 4, 5A, 6" and 7 to 14, inclusive, are hereby established. The use of property

"zone map designations which accompany said use of property zone maps are hereby declared to be part hereof. No building or premises shall be erected or used for any purpose other than a purpose permitted in the use district in which such building or premises are located."

All private and public property in San Francisco, except that which is used for streets and highways, is classified in accordance with the various zone districts established by our zoning law.

You state that the portion of the railroad right-of-way here in question appears as "clear white" in the zoning map. An examination of the "zone map legend" accompanying the map indicates that a designation of clear white indicates a "Second Residential District." You state that all clear white areas in the "Zone Maps," other than city streets, have always been considered by the City Planning Commission as being in the "Second Residential" district.

In view of all the above, I am of the opinion that the all-white railroad rights-of-way herein involved constitute property that is in a "Second Residential District."

Respectfully submitted,

CITY ATTORNEY.

TO: DEPARTMENT OF CITY PLANNING
100 Larkin Street, San Francisco 2
Attention: James R. McCarthy,
Acting Director.

NSW

4179

September 1, 1948

SUBJECT: TAX LEVY ORDINANCE, TO MEET EXPENDITURE APPROPRIATIONS OF ANNUAL APPROPRIATION ORDINANCE, ESTIMATES OF REVENUE, A FUNCTION OF THE BOARD OF SUPERVISORS.

Gentlemen:

You have requested an opinion as follows:

"The Board of Supervisors will consider on Wednesday, September 1, at 2 p.m., Bill 5506 (Ser. 1939) providing revenue and levying taxes for the fiscal year ending June 30, 1949.

"In connection with its consideration of said bill, the Board respectfully requests that you furnish it with your written opinion in response to the following queries:

"Is it mandatory that the Board of Supervisors enact said bill as drafted and with the figures inserted therein by the Controller? Or, in the alternative, may the Board in its discretion, and in view of pertinent charter provisions, change the amount of the tax levy in its aggregate and in its component parts?

"The Board's inquiry is made with particular reference to the item appearing in said bill as "Municipal Railway Operating .... $ .215088". May the Board if it is so inclined, reduce that item to an amount which will produce a lesser amount of tax revenue for said purpose?

"At the same time, the Board will consider Bill 5507 (Ser. 1939), amending the Annual Appropriation Ordinance in order to reflect certain revenue and expenditure appropriation adjustments.

"In connection therewith, is it mandatory that the Board make such adjustments, or in its discretion may the Board decline to enact said bill or any item contained therein?

"The Board's attention is directed primarily to the item listed as "Municipal Railway Operating" revenue to be provided from taxes. The draft presently before the Board reflects a change in said item from $970,426 to $1,776,703. Must the Board accept the revised revenue appropriation and include it in the enactment of the bill, or in its discretion may the Board decline to change the figure of $970,426?"

O P I N I O N

Section 78 of the Charter is in part as follows:

"On or before the 15th day of September of each year, the board of supervisors by ordinance shall levy a tax, the estimated proceeds of which, together with the total amount of receipts and revenues estimated to be received from all sources, will be sufficient to meet all appropriations made by the annual appropriation ordinance."

The Board of Supervisors is required by this provision to levy a tax. The duty to do so is a mandate of the Charter.

The amount of the tax must be sufficient to meet all expenditure appropriations of the Annual Appropriation Ordinance. Certain amendments of this ordinance are required by law to be made to conform to the provisions of Section 151.3 of the Charter and with State law. These total expenditure appropriations of the Annual Appropriation Ordinance as amended are therefore at this date fixed sums. These expenditure appropriations reflect these items of the Annual Budget. They may not be altered except as authorized by Charter or controlling State law. (Sullivan v. McKinley, 14 Cal. 2d). The total amount of the secured assessment roll is also at this date a fixed sum.

Revenues estimated for the current year must be deducted from expenditure appropriations in order to arrive at the amounts for which a tax levy must be made.

It is your duty to estimate all of these revenues in the process of fixing the tax rate. Your estimates, other than the revenue estimates contained in the Annual Appropriation Ordinance, must be by amendment of the revenue appropriation items of that ordinance. Under the quoted provisions of Section 78 of our Charter, your estimate of "the amount of receipts and revenues" is not stated to be that contained in the Annual Budget and Appropriation Ordinance, and under this section you are required at tax levy time to include the total amount of receipts and revenue from all sources. This is a mandate to you under this provision.

Your estimate is necessarily based first on those contained in the Annual Budget and Appropriation Ordinance, however, as they represent the annual legislative method for the basic fiscal functioning of the City and County. To be valid and to conform to your Charter duty to levy a tax sufficient to meet all appropriations made by the Annual Appropriation Ordinance, your estimate of revenues, if it is to alter that contained in the Annual Appropriation Ordinance, must be based soundly upon facts justifying the change and can not be an arbitrarily chosen sum.

The Municipal Railway Operating item of $.215088 is necessitated entirely by expenditure appropriations contained in the Annual Appropriation Ordinance as amended. You can not change these expenditure appropriations in that ordinance. You can make your own estimate of revenues to the extent stated above. The Controller has done this for you in very great detail at your request, but it is your ordinance and the estimate of revenue is in the finality your responsibility.

I have reviewed the Controller's tax rate schedules for the current fiscal year, made by him in order to respond to your request. I am impressed with the exact care and attention to detail which have gone into their preparation. The Controller has advised me in response to my query that since 1932 the Controller's estimates of revenue given

to your Board have been accurate within less than 1/2 of 1 percent.

Any change in the revenue estimates therefore must be obviously based upon facts. This change must not be an arbitrary one nor mere conjecture, in order to be valid and to conform to the mandate of Section 78. In view of the factual estimates which form the basis of the ordinance as presently drafted, it appears to me that any change in these revenue estimates should likewise be based upon facts demonstrating the inaccuracy of those estimates submitted to you by the Controller. I have of course made no accounting check on the Controller's computations or estimates.

The Controller's function here is advisory only in nature. His work has been done at your request and is only for your assistance. The estimate of revenue for this ordinance is your responsibility, not that of the Controller; but as he is primarily the revenue estimating officer of the City and County I advise that any study of these estimates for the purpose of alteration be based soundly and with extreme care on well authenticated facts. In the absence of error, capriciousness or arbitrary disregard of facts, the Controller's figures should be accepted.

Your second question relates to Bill No. 5507 (Series of 1939), an amendment to the Annual Appropriation Ordinance. The revenue items in this bill are estimates factually made. To alter in any respect the item in the bill fixing the tax rate of $.215088 would require first a change in the revenue item in Bill No. 5507 for the Municipal Railway Operating Fund. Your power in this regard is covered by the previous discussion.

The expenditure items set forth in this bill are made necessary by provisions of law.

The two main expenditure items in the bill concern the Public Welfare Department and the School District.

The increase in Welfare appropriations for aid is required by virtue of increased State and Federal appropriations for this purpose. The increase in expenditures is offset entirely by increased revenue in the form of State and Federal aid to needy children, aged and blind, which aid is administered through the City and County. Unless the expenditures are made. the revenues would not be received.

The increase in School District appropriations is also a mandate of the law. At the time you were required to pass the Annual Appropriation Ordinance you were required to base it on a preliminary budget submitted to you by the School District. The School District's final budget requires these adjustments in both revenue and expenditure items.

The expenditures set forth in this ordinance are mandatory.

You are therefore advised, that it is not mandatory that you enact Bill No. 5506, the tax levy bill, as drafted. You may not alter the expenditure appropriations of the Annual Appropriation Ordinance, as amended to conform to requirements of law, on which the tax bill is based; and you may alter revenue estimates only as you base your action

on facts as stated herein. To this extent and to this extent only, you may alter the tax levy ordinance in a component part after appropriate amendment of the Annual Appropriation Ordinance.

As to the Municipal Railway Operating item of the tax, this item can not be changed unless the amount specified for this Fund in Bill No. 5507 be modified in accordance with the factual requirements for estimates as herein set forth.

As to Bill No. 5507, any amendment of it should be confined to the section relating to revenues within the restrictions above stated.

Respectfully submitted,

CITY ATTORNEY

To: Board of Supervisors

WP
cc: Mayor
Controller

4180

September 1, 1948

Subject: COMPENSATION ANNUAL, OF POLICE DEPARTMENT MAY NOT BE REDUCED WHERE BASIC WEEK IS CHANGED.

Dear Sir:

This office is in receipt of a request for an opinion as follows:

> "The Police Commission and I wish to thank you for submitting to us your written opinion on the permissibility and legality of establishing a basic work-week of fewer than forty-four hours in the San Francisco Police Department. Your treatise left no doubt as to our latitude in dealing with the problem. However, we are now concerned with your official opinion on the second part of the question posed in Paragraph 5 of our original letter to you, which reads as follows:
>
> > 'Is the Police Commission authorized to reduce the present forty-four hour week of service without A CORRESPONDING REDUCTION IN COMPENSATION AS NOW PROVIDED FOR SAID BASIC WORK-WEEK OF FORTY-FOUR HOURS.'
>
> "Your written opinion on the latter question is earnestly and urgently solicited."

OPINION

Section 35.5½ subdivision (b) provides as follows:

> "The basic week of service for each member shall be not more than forty-four (44) hours and the annual compensation set forth in section 35.5 of this charter shall be based upon said basic week of service."

Under the above provision the basic week of service for members of the police department is not established by the charter but the power to establish the basic week of service is vested in the police commission with the limitation that the basic week of service may not be more than 44 hours. (See my opinion August 4, 1948). The latter portion of subdivision (b) stating

that "the annual compensation set forth in Section 35.5 of this charter shall be based upon said basic week of service", provides that work for the basic week as established by the police commission shall entitle the member of the police department to the salary established for his rank by Section 35.5.

You are therefore advised that the police commission is entitled to establish the basic week of service for members of the department and that the action of the police commission in so establishing the basic week of service may in no way affect the annual compensation set forth for members of the police department in Section 35.5. To rule otherwise would vest in the police commission the power to change the annual compensation established by Section 35.5 of the charter for members of the police department, a power which is clearly vested in the voters of the City and County of San Francisco and not in the Police Commission.

Your attention is called to the fact that there is some conflict between subdivisions (d) and (f) of Section 35.5½ concerning the question of when overtime will commence for members of the police department when a basic week of less than 44 hours is adopted.

Respectfully submitted,

JOHN J. O'TOOLE

City Attorney

To: Police Commission

cc to The Mayor
Controller

BJW

4181

September 1, 1948

SUBJECT: RESPONSIBILITY OF PACIFIC GAS AND ELECTRIC COMPANY TO BEAR COST OF RELOCATING FACILITIES TO ACCOMMODATE INTENDED PUBLIC WORK

Dear Sir:

I have your request for opinion as follows:

> "We are about to call for bids for the construction of the North Point Sewage Treatment Plant located in an area bounded by Francisco, North Point, Kearny and Stockton Streets, and will also soon call for bids for the construction of the North Point Sludge Treatment Plant to be located in the Islais Creek District. We notified the Pacific Gas and Electric Company of this fact and informed them that certain streets were to be closed in each instance and that we would require that they remove their utilities therefrom.
>
> "In reply we received two letters, one dated July 20, 1948, in connection with the North Point Sewage Treatment Plant and one dated July 22, 1948 in connection with the Sludge Treatment Plant, copies of which are herewith enclosed, notifying us they would expect reimbursement for this work and setting up their estimated costs thereof. In reply we wrote them under date of July 27, 1948 as per copies enclosed, and on August 17, 1948 received from them an opinion of their Legal Department which is also attached.
>
> "This opinion contends that we must pay for the removal of their utilities from the streets to be closed.
>
> "Will you please advise me in this matter."

The opinion rendered by the utility's legal department, attached to your above request, has been evaluated in the preparation of the following:

O P I N I O N

There can be no doubt that the treatment and disposal of

sewage and other refuse may be regulated by the municipality as a governmental function under its constitutional power to provide for the sanitation needs of its inhabitants, provided only that such regulations are not in conflict with general laws. (Calif. Const., Article XI, Section 11). Nothing has been discovered in such general laws to prohibit the construction of the two plants in question herein.

The utility company, as evidenced by the opinion of its legal department, takes the position that while it may be required to relocate its facilities to accommodate the intended work, the expense of doing such must be borne by the City. This contention is premised upon its co-called "constitutional franchise" as declared in Section 19 of Article 11 of the Constitution of California. There is no doubt that the company does have the advantage of a constitutional franchise, but I expressly reserve opinion as to whether it extends to anything greater than the right to use the public streets for supplying "gas light or other illuminating light". Such constitutional grant to the company under Section 19 is of no greater dignity and force than the powers granted to cities, counties and towns under Section 11 of the same Article.

Under the common law rule, holders of franchises assumed the risk of the location of their facilities in public streets and were bound to make such changes, at their own expense, as public convenience or security required. (Westchester Elec. Co., Westchester Co. Park Commission, 255 N.Y. 297, 174 N.E. 660; see also L.R.A. 1917 D, 664). In New Orleans Gaslight Company v. Drainage Commission, 197 U.S. 453, 49 L. Ed. 831, the U. S. Supreme Court was confronted with an issue similar to that herein involved- i.e., the duty of a gas utility to remove its mains and pipes to accommodate a public drainage system. The Court said (pp. 461-462):

> "We think whatever right the gas company acquired was subject, in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare. These views are amply sustained by the authorities. (Citing cases) ..... The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The City made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the State, for a purpose highly necessary in the promotion of the public health, it has become necessary to

> change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense, none of the property of the gas company has been taken and the injury sustained is damnum absque injuria."

In Chicago, B. & Q. R. Co. vs. Illinois, 200 U.S. 561, the Court followed the rule enunciated in the New Orleans case; and, in discussing the limitations upon police power in such instances, said the following (p. 592):

> ".....the validity of a police regulation, whether established directly by the State or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose."

In Dillon on Municipal Corporations (5th Ed.), Vol. 3, pp. 2060 et seq., the text and authorities cited therein are in accord with the view that a public utility can acquire no indefeasible right to a particular location for the placement of lines, wires, mains, etc., in, upon or over the public streets, and when paramount public interest demands a removal and relocation thereof, the expense of such must be borne by the utility. (See also McQuillan on Municipal Corporations, (2d Ed. Rev.), Vol. 4, pp. 1047-1048).

In Merced Falls Gas and Electric Company vs. Turner, 2 Cal. App. 720, the utility company maintained that in view of its constitutional franchise granted by Section 19 of Article 11, it could not be compelled to remove and relocate its electric light poles to accommodate intended street improvements in the City of Merced. The Court concluded that such contentions were without merit. After noting the city's police power control over its streets under its incorporating act and Section 11 of Article 11 of the Constitution, the Court stated (p. 723):

> "The City authorities will not be allowed to enforce regulations which are tantamount to a denial of appellant's right to use the streets, or are arbitrary, capricious, unreasonable or prohibitory in their nature or effect. (Citing cases) But the Constitution in providing for the exercise and enjoyment of the franchise

> owned by the appellant, did not grant an absolute, indefeasible right or easement in the particular spots of earth where its poles were planted originally ..... Courts will not hesitate to stay the arm of municipal power when any attempt to curtail or deny the constitutional right is made manifest or a clear abuse of discretion is shown. But they will as unhesitatingly frown upon the doctrine that the constitutional provision in question must be construed as an abdication or denial of power on the part of the cities to widen, straighten, beautify and improve streets and sidewalks, and to compel property owners of every class and kind to conform to all reasonable regulations redounding to the general good."

There is apparently no contention herein that the contemplated sanitation improvements are not reasonably necessary, nor is there any attempt to deprive the utility of its right to use the streets in general. Hence, the regulations contained in Sections 752, 753 and 754 of the Public Works Code are not beyond the city's police power.

In light of the foregoing, it is my opinion that the Pacific Gas and Electric Company must bear the cost of relocating its facilities to accommodate the intended public work, and you are accordingly so advised.

Respectfully submitted,

JOHN J. O'TOOLE
City Attorney

To: Director of Public Works

cc: Chief Administrative Officer
W.F.B.

4182

September 2, 1948

SUBJECT: BUSINESS SITUS OF ACCOUNTS PAYABLE AS A BASIS OF ALLOWING A DEDUCTION FROM PERSONAL PROPERTY TAX PAYABLE BY FOREIGN CORPORATION.

Dear Sir:

I have your request for an opinion as to what debts are allowed as deductions from the personal property tax imposed on the intangible personal property owned by a foreign corporation doing business in this city through a branch office.

O P I N I O N

As the subject of this opinion is closely related to a previous opinion rendered by this office, reference is made to my opinion No. 4086, dated March 18, 1948, entitled "Business Situs of Intangibles for Purposes of Taxation Owned by Foreign Corporation or Owner in Another State."

The debts which are allowed as a deduction from the tax on intangible personal property tax are defined in Section 114 of the Revenue and Taxation Code of the State of California as follows:

> "'Debts.' 'Debts' means unsecured liabilities of the same class as is subject to taxation owing by the assessee to bona fide residents of this State, or to persons doing business in this State."

In complying with the provisions of the said Section 114 and the reasoning of the California cases dealing with right to tax intangible personal property owned by a foreign corporation or owner in another state cited in the opinion referred to above, my conclusion relative to deductible debts is as follows:

The debts owing by a foreign corporation or non-resident doing business in California are deductible from the personal property tax on intangibles when they are owing to California residents or to persons doing business in California

and are incurred in connection with the operation, maintenance and business of the assessee's branch office in this state.

Respectfully submitted,

CITY ATTORNEY

To: Controller
CWD

4183

September 3, 1948

SUBJECT: INTERPRETATION OF ORDINANCE NO. 4524, GOVERNED BY HOUSING AND RENT CONTROL ACT OF 1947; ACTION BY DISTRICT ATTORNEY TO BE DETERMINED BY HIS OFFICE.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "The District Attorney's Office is charged with the enforcement of the ordinance regulating rents to be charged permanent guests of hotels in this city. The ordinance contains some provisions which must be clarified in order to permit this office to satisfactorily enforce its provisions.
>
> "According to Section II, Sub-section 4, a landlord may apparently bring an action in unlawful detainer to oust a tenant where such ouster is necessary to alter, remodel or repair the premises and such work is necessary to '<u>protect and conserve the housing accommodations</u>'. The specific issue which we are called upon to determine is the precise meaning of the underscored words. If all that is contemplated is a redecoration job, does this comply with the statutory language? Or would there be compliance if plaster from the ceiling was cracked and likely to fall?
>
> "If a landlord should bring an action in unlawful detainer to oust a tenant from possession where this office feels there are facts sufficient to constitute a violation of the ordinance on the part of the landlord, would this office be justified in charging him with the crime of misdemeanor or would the proper remedy be for this office to intervene in the civil action?
>
> "Your early reply with respect to these questions will be appreciated."

O P I N I O N

Ordinance No. 4524 of the Board of Supervisors of the City and County of San Francisco regulating the possession

of rooms and evictions therefrom and maintaining rental ceilings in all hotels within the City and County of San Francisco was adopted by the Board of Supervisors of the City and County of San Francisco when hotel accommodations were decontrolled and the federal regulations removed in order to institute, by local regulation, controls of hotel accommodations. The provisions of the above mentioned ordinance referred to in your request and other provisions relating to evictions are substantially the same as the provisions of the Housing and Rent Act of 1947 which rental act was used as a guide in the drafting of the above ordinance.

You are therefore advised that inasmuch as the provisions of the above mentioned ordinance are substantially the same as those of the Housing and Rent Act of 1947, you should be governed by the interpretation of the provisions of the Housing and Rent Act of 1947 in construing the provisions of Ordinance No. 4524.

As to the question of whether you should institute criminal proceedings in the situation where your office feels that there is a violation of the ordinance on the part of the landlord or whether you should intervene in the civil action brought by the landlord to oust a tenant, I feel that this question is one of policy which must be determined by your office. In certain situations you might deem it advisable to institute criminal proceedings while in other situations you might deem it advisable to intervene in the civil action.

Respectfully submitted,

CITY ATTORNEY

To: District Attorney
LSM

4184

September 17, 1948

SUBJECT: CHARTER AMENDMENTS, PROCEDURE FOR SUBMISSION.

Gentlemen:

You have requested this noon an opinion for this afternoon as follows:

> "Will you kindly furnish the President of the Board of Supervisors with your written response to the following queries, at or prior to the hour of 4:00 p.m., Friday, September 17, 1948:
>
> "(1) Where in the law does there appear a provision or provisions indicating the vote of the Board of Supervisors which is necessary in order to submit to the electorate a charter amendment?
>
> "(2) What vehicle is necessary to accomplish the submission to the electorate of a charter amendment - ordinance, resolution, motion, etc.?
>
> "As a part of your response, will you please indicate the authorities in consideration of which your advices are given."

O P I N I O N

1. Article XI, Section 8 of the State Constitution provides in part as follows:

> "The Charter of any city or city and county may be amended by proposals therefor submitted by the legislative body thereof on its own motion and on petition signed by 15 per cent of the registered electors, or both."

Section 25005, Government Code, provides in part as follows:

> "No act of the board shall be valid or binding unless a majority of all the members concur therein."

This section provides that under state law a majority

of all members of the Board is required for action.

The concurrence of the Mayor is not required.

Harrison v. Roberts,
145 Cal. 173;

18 Cal. Jur. 773.

2. Amendment of a charter is a state affair. A freeholders' charter may be amended only in the manner provided in the Constitution.

18 Cal. Jur. 772 note 18,
citing cases.

See also 10 year Supplement, p. 140.

Section 1802, Elections Code, specifically provides that "the procedure for amending freeholders' charters is prescribed in Section 8 of Article XI of the State Constitution."

The procedure for amending charters specified in Article XI, Section 8, is exclusive and controlling; any charter provision in conflict therewith is invalid.

Uhl v. Collins, 217 Cal. 1;

Garver v. Council of City of Oakland,
96 C. A. 560.

The State Legislature has provided procedure as to this constitutional provision, in its relation to freeholders' charter amendments, only in Elections Code, Division 4, Chapter 3, Article 3. The only section there relating to the present subject is Section 1802, quoted above, referring to Article XI, Section 8 of the Constitution.

This section provides that a charter may be amended by proposals therefor submitted by the legislative body on its own motion.

A motion adopted by the Board is most assuredly "on its own motion".

Since it has been determined by the Supreme Court that concurrence of the Mayor is not proper, the question

of whether the Board's action in this regard begins with the words "Be It Enacted" or "Be It Ordained" or "Be It Resolved" or "I move" is of the utmost unimportance.

It is to be noted that every proposal to amend the Charter of the city and county, as submitted by this office to the Board of Supervisors, contains the words "The Board of Supervisors of the City and County of San Francisco hereby submits to the qualified electors of the City and County of San Francisco at an election to be held therein" on _____ date "a proposal to amend the Charter of said city and county by amending" etc.

As stated in Harrison v. Roberts, supra: "The real essential to an amendment is, after all, the ratification by the people at an election. The submission of the proposal to amend is of course essential as a preliminary."

The advice of this office to the Board has been and continues to be that the Board acts properly when it submits to the voters a proposal to amend the Charter by motion to submit adopted by a majority of its entire membership.

Respectfully submitted,

CITY ATTORNEY

To: Board of Supervisors
cc: The Mayor
WP

4185

September 20, 1948

SUBJECT: PURCHASE AND USE TAX; APPLICABILITY TO LEASES AND RENTAL OF TANGIBLE PERSONAL PROPERTY

Dear Sir: I have your request for an opinion as follows:

> "The Tax Collector has had inquiries from Remington Rand, Inc., as to whether the San Francisco Purchase and Use Tax applies to the revenues obtained by the company from the leasing of its equipment in San Francisco. The Tax Office has advised the company that the purchase and use tax does not apply to rentals or leases.
> However, it has come to our attention that the State Board of Equalization offers an option to companies renting business equipment by which the company, in lieu of paying the use tax on equipment brought into California, may pay a tax on the revenues from leases or rentals.
> International Business Machines Corporation does a business similar to that of Remington Rand.
> Will you please advise this office on the following questions:
>
> 1. Does the Purchase and Use Tax apply to business or other equipment brought into San Francisco for rental purposes?
>
> 2. Would it be possible for the city to parallel the State Board of Equalization's practice of permitting companies to pay a use tax on the basis of rentals received from leased or rented equipment?

O P I N I O N

Neither under the State Sale Tax law nor under our Purchase and Use Tax Ordinance, does the tax apply to leases or rental of tangible personal property. However, a lease or rental may actually involve a purchase or a taxable use of the property and the tax will apply. For example, Section 5 of our ordinance provides as follows:

> "A transaction whereby the possession of property is transferred, but the seller retains the title as security for the payment of the price is also a purchase."

By virtue of this provision a transaction which is designated as a lease or rental for the purpose of retaining title by the seller as security for payment of the purchase price with the understanding that the lessee shall become the owner of the property upon completion of the prescribed payments, constitutes a purchase and the tax is payable on such transaction to the City and County.

The option offered by the State Board of Equalization to pay the tax on the revenues from leases or rentals, arises in a situation where the property is purchased under a resale certificate but is thereafter rented by the purchaser. The authority for this option is contained in Section 6094 of the Revenue and Taxation Code which provides as follows:

> "If a purchaser who gives a certificate makes any use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business, the use shall be deemed a retail sale by the purchaser as of the time the property is first used by him, and the cost of the property to him shall be deemed the gross receipts from such retail sale. If the sole use of the property other than retention, demonstration, or display in the regular course of business is the rental of the property while holding it for sale, the purchaser may elect to include in his gross receipts the amount of the rental charged rather than the cost of the property to him."

The only comparable provision in our Purchase Use and Tax Ordinance is not as broad as the State law and merely provides:

> "A purchase for resale shall be deemed to become a retail purchase and subject to tax as such when used or otherwise consumed by the purchaser."

Thus, under our ordinance, when property is purchased for resale and thereafter rented, such rental constitutes a use by the purchaser and the tax is payable on the purchase price of the said property. There is no authority in the Purchase Use and Tax Ordinance for the Tax Collector to offer the purchaser the option of paying the tax on the revenues from leases or rentals rather than on the purchase price.

In answer to the two questions set forth in your letter,

you are therefore advised as follows:

1. That the tax does not apply to business or other equipment brought into SanFrancisco for rental purposes unless the property has been purchased at retail to be so used, in which event the tax applies to the purchase price and not to the income from the rental or unless the rental actually involves a sale but is denominated a rental for the purpose of retaining title in the seller as security for the purchase price.

2. That when property is purchased for resale and thereafter rented, the tax collector can be authorized to parallel the State Board of Equalization's practice of permitting companies to pay the tax on the revenues from leases or rentals rather than on the purchase price by appropriate amendment to the Purchase and Use Tax ordinance. As the ordinance now stands he has no such authority.

Respectfully submitted,

CITY ATTORNEY

Tp: Chief Administrative Officer

4186

Dear Sirs: September 23, 1948

RE: DEPOSIT AND INVESTMENT OF PUBLIC MONEYS

I am in receipt of your letter enclosing the following proposal submitted to the Finance Committee of the Board of Supervisors:

"WHEREAS, The Treasurer of the City and County of San Francisco has on deposit, as of July 31, 1948, the sum of $24,170,000 in inactive deposits, earning various minimum rates of interest, and also has, in approximately 150 other funds, the sum of $48,941,055.00, which funds are considered active and thereby do not earn any interest, and

"WHEREAS, These latter funds could earn a substantial revenue for the City and County of San Francisco if legal means could be instituted for the placement of said funds in interest earning depositories or guaranteed temporary placements, which would not impair in any way the prompt dispatch of city business and would assure a revenue not presently earned, now, therefore, be it

"RESOLVED, That the Finance Committee of this Board of Supervisors conduct an investigation into the foregoing circumstances with the purpose in mind of bringing about a greater earning facility of all funds of the City and County of San Francisco, as aforestated."

O P I N I O N

While we have rather elaborate provisions in our Charter relative to the deposit by the Treasurer of public moneys, they are not effective for the reason that under the Constitution of the State of California, to wit, Section 16-1/2 of Article 11 thereof, it is provided that regulations pertaining to the deposit of public moneys can only be made in accordance with laws enacted by the State Legislature by 2/3rds vote of each House, and which laws are subject to a referendum by the people of the State.

In 1932, shortly after the advent of the present Charter, the constitutionality of the Charter provision was questioned by the then Treasurer, Duncan Matheson, and the writer at his request took the matter to the Supreme Court to determine the question as to whether deposits of public moneys in San Francisco should be made in accordance with the provisions of the Charter or in accordance with the State law.

The Superior Court decided that the State law and not the Charter provisions governed. The matter then went to the Supreme Court and was transferred to the District Court of Appeals for determination and, on January 30, 1932, the District Court of Appeals, speaking through Justice Dooling, held that the State law and not the provisions of the Charter governed the deposit of public moneys in San Francisco

and that the matter of the deposit of these moneys was not subject to Charter regulation for the reason that Charter provisions did not have to be adopted by a 2/3rds vote of either House of the State Legislature nor were they subject to any referendum by the people.

This case is

McGuire v. Wentworth,
120 Cal. App. at page 340.

In the case, the Court gave consideration to all former decisions on the same subject and held, as I have stated, the Charter provisions do not govern the deposit of public moneys but they are governed by the action of the State Legislature acting under the authority of Section 16-1/2, Article 11, of the Constitution. We are therefore relegated to the State law as to what the duties of the Treasurer are regarding the deposit of public moneys. The State statute was originally enacted in 1933 and is known as Act 2834A of Deering's Code. The Act has been amended from time to time but it has never taken away from the Treasurer the power to regulate the deposit of public moneys except in the case where there is a surplus in the Treasury which is not needed for the immediate affairs of the county or city and county. When such a condition arises, the Board of Supervisors has the power to order the Treasurer to invest the surplus moneys in bonds. The Board, however, has no power whatsoever to regulate how, when or where, or on what terms, moneys shall be deposited in any bank or banks for this is a matter that lies entirely within the discretion of the Treasurer. Under the Constitution and under the laws of the State, he is made the custodian of the moneys and it is up to him to have such moneys available at such times as may be necessary to meet the contingencies of his government. It is the duty of the Treasurer to determine what bank the moneys should be deposited in and the character of the securities which should be taken to protect the deposits, and the Board of Supervisors is not authorized to trespass upon the duties of the Treasurer in this regard.

A careful investigation of all the amendments to Act 2834A shows that this power has never been taken away from the Treasurer. True, it has made provisions for different securities. It has also made provisions for reduced rates of interest to meet the conditions and the times, but still, the right to determine where moneys should be deposited rests in the discretion of the Treasurer. He is the custodian of the funds and must have them on hand when they are needed for municipal or for county purposes, and the Board of Supervisors can not say as to what particular amount he should deposit in bank, or in what banks these amounts should be deposited, or what rate of interest the Treasurer should receive on these deposits. These are all matters that lie within the sound discretion of the Treasurer and, as long as he does not abuse this discretion, the Board of Supervisors has no jurisdiction in the premises provided, as I have said, that if the Board of Supervisors should find that there is a surplus on hand which is not needed for current expenditures, it would have the power, by the enactment of a proper ordinance, to direct the Treasurer to invest these funds in bonds. Before doing this, however, the Board should take into consideration the immediate needs of the County or Municipality as to when the money should be

returned to the Treasury to meet contemplated obligations and should also take into consideration that when moneys are invested in bonds, the bonds are not always convertable into cash without delay and that also, in the matter of the buying or selling of bonds by the Treasurer, there is a brokerage commission to be paid which, under ordinary conditions, may result in a material reduction in the amount of earnings on the moneys invested. Furthermore, bonds fluctuate in value and even if there are surplus funds on hand, the Board of Supervisors should, to a large extent, be governed by the direction of the Treasurer, who is really the financial official of the Board as to how the investment should be made.

Therefore, you are advised that in the first place unless the Board should determine that there are surplus moneys on hand which are not needed to meet the current arising obligation, the matter of the deposit of these moneys in banks lies with the Treasurer. He is responsible for the moneys on his official bond and must assure himself that if he does deposit them in any bank that he has ample security for their repayment.

In the matter of the investment of surplus funds, great consideration should be given to the advice of the Treasurer for the reason that he is responsible for the safekeeping of the money and this responsibility should not be taken away from him without good reason.

Respectfully submitted,

CITY ATTORNEY

To: Board of Supervisors
cc: Mayor
cc: Treasurer

JJO'T

4187

September 23, 1948

Subject: Cherry Valley Appropriation.

Gentlemen:

You have asked, is it mandatory that an appropriation of $25,000 be presently made for the purpose of continuing work on the Cherry River Project of the Water Department and if it is necessary to make appropriations for this purpose in the future?

OPINION

Under the Raker Act, passed by the 63rd Congress (September 3, 1913), the United States granted the City certain lands and rights-of-way within the Yosemite National Park and Stanislaus National Forest. These grants are to be used for the purpose of developing a water supply for domestic purposes, as well as making it mandatory upon the City to develop electric energy.

A part of section 5 of the Raker Act reads as follows:

" * * That the construction of the aforesaid works shall be prosecuted diligently, and no cessation of such construction shall continue for a period of three consecutive years, and in the event that the Secretary of the Interior shall find and determine that there has not been diligent prosecution of the work or of some integral and essential part thereof, or that there has been a cessation of such construction for a period of three consecutive years, then he may declare forfeited all rights of the grantee herein as to that part of the works not constructed, and request the Attorney General, on behalf of the United States, to commence suit in the United States District Court for the Northern District of California for the purpose of procuring a judgment declaring all such rights to that part of the works not constructed to be forfeited to the United States, and upon such request it shall be the duty of the said Attorney General to cause to be commenced and prosecuted to a final judgment such suit: * *."

In the Cherry Valley, which lies within the Stanislaus National Forest, the City paid for and acquired very valuable water rights, the development of which was considered from the inception of the Hetch Hetchy Project as constituting part of the general water and power supply for the City and County of San Francisco.

The Hetch Hetchy Project, as such, is far from completed to its ultimate capacity. In the event the City were to discontinue construction for a period of three consecutive years, all undeveloped portions of the project could, under certain conditions, revert to the Government and the rights of the City forfeited.

In view of the fact that a very substantial sum of money is provided for under the Flood Control Act of 1944 that may be used toward a part of the development of the Cherry Valley Project and that during the 80th Congress recently concluded an appropriation of $600,000 for this purpose has been made and allocated to the Cherry Valley Project, the City must be prepared to properly use this money and the appropriation sought before your Board is necessary for a continuation of the work done in Cherry Valley.

The City may hereafter be charged by the Government with failure to meet the intention of the Raker Act unless construction is diligently prosecuted, and hence it is apparent that the appropriation sought before your Board should be authorized.

It is my opinion that it would be dangerous to discontinue construction for "three consecutive years" or any portion of this period and the City should be in a position to show that it has always diligently prosecuted the work stated in the Raker Act.

I therefore conclude that the appropriation should be made for the purpose of protecting the interests of the City in Cherry Valley and that in the future appropriations should be made annually for the purpose of development and construction in Cherry Valley and in probably far larger amounts than the sum presently sought.

Respectfully submitted,

JOHN J. O'TOOLE, City Attorney

By _____

DION R. HOLM
Assistant City Attorney

To: Board of Supervisors

DRH

4188

September 27, 1948

SUBJECT: FORMING AN ASSESSMENT DISTRICT FOR THE PURPOSE OF MEETING THE COST OF CONSTRUCTING AND IMPROVING THE ISLAIS CREEK BRIDGE.

Dear Sirs:

You have directed to my attention that there is an ordinance pending before the Board of Supervisors which provides for a certain amount to be used for the construction of the bridge over Islais Creek in San Francisco. From the facts which I have been able to gather, Islais Creek is a bridge which actually connects two portions of Third Street, which is one of the major highways in San Francisco. The construction of this bridge is being partially financed out of gasoline tax funds as an improvement to a major street in San Francisco. I understand that Supervisor Mancuso has suggested that an assessment district might be formed whereby the cost of installing this bridge would be made a charge against the property owners benefited by its installation. I further understand that Third Street, being a major street in the City of San Francisco, accommodates through traffic in and out of San Francisco.

OPINION

A bridge is merely a portion of a street and the law is so well settled that authority is not needed to sustain it, that street improvements can only be made a charge on adjacent property when the particular property is benefited by the improvement. There is no particular property benefited by the Islais Creek bridge. It has been part of a main thoroughfare for a great number of years and the construction of the bridge is made necessary by the widening of the adjacent streets to meet increased traffic conditions. Islais Creek, as you well know, is a body of water that extends in a westerly direction from the San Francisco Bay inland. As far as the creek itself is concerned, it is used mainly as a docking place for vessels carrying lumber which is discharged on each side of the creek. Therefore, it cannot be said that the building of a bridge would be of any benefit to the owners of property on either side of the creek. As a matter of fact, I presume the property owners would be far better off if there was no bridge which would hinder water traffic in and out from the creek, for under existing conditions and when the bridge is being used boats desiring to enter or depart from the creek have to wait the raising or opening of the bridge. Therefore, it would be very difficult for the Board of Supervisors to make a finding that the construction of the bridge was of any benefit to anybody owning property along the banks of the creek. Under these conditions it appears to me that the expenditure of an appropriation from the gas tax fund is perfectly proper as an improvement to a major highway in San Francisco for it would be almost impossible for the Board of Supervisors to say which particular piece of property in the city was benefiting by the improvement. As already said, the

property along the adjacent banks of the creek is not benefited and the building of the bridge is one of those improvements which is for the general benefit of San Francisco and being along a major highway, already declared such by the Board of Supervisors and the State Highway Department, it seems to me that the cost of repairing or extending the bridge is a proper tax against the gas funds, and unless your Board could find that there is property which is particularly benefited and, as I have said, the property along the banks of the creek is not particularly benefited, I do not know on what particular property along the creek you could levy an assessment. At the present time most of this property is covered by an assessment district which was organized many years ago for the purpose of improving all the property in the district. This improvement did not include the building of the bridge on Third Street for the reason that it was already in existence and, in all probability, the continuation of the bridge would not have been of any benefit to the district. You are, therefore, advised that in my opinion the payment of the amount requested in the ordinance for the purpose of widening and repairing the Islais Creek Bridge is a proper charge against the gas tax fund to which the City is entitled.

Respectfully submitted.

JOHN J. O'TOOLE

City Attorney.

To: Board of Public Works

cc to Board of Supervisors
to The Mayor

JJO'T

4189

September 27, 1948

SUBJECT: APPLICABILITY OF PARKING METER ORDINANCE TO VEHICLES EMPLOYED IN FEDERAL GOVERNMENT ACTIVITIES

Dear Sir:

I am in receipt of your request for opinion as follows:

> "We have been discussing with a Field Representative, Executive Office of The President, Bureau of the Budget, Washington D.C., the matter of parking space around the Federal Building at Fulton and Leavenworth Streets, where parking meters have been installed.
>
> "It is the contention of the Federal Government that regardless of the fact that meters are in place, the Government may ignore them and use the metered parking space without paying the parking meter charge. In support of this contention, Mr. J. W. Rupley, Chief Field Representative, discusses the matter from the viewpoint of the Federal Government in the attached communication to this office,
>
> "Will you please give consideration to the contentions raised in the attached letter, and advise me as to the city's legal rights in the matter."

The attached communication from the Chief Field Representative, Bureau of the Budget, has been studied in formulating the following opinion.

O P I N I O N

There is no express language in the parking meter ordinance to indicate that the sovereign, in addition to the citizens, is meant to be bound by the provisions thereof. In conformity with familiar rules of statutory construction, the enacting government and its agencies are deemed to be excluded from the effect of such enactment. (State of California v. U.S., 297 U.S. 175; C.J. Kubach Co. v. McGuire, 199 Cal. 215; Am. Dig. "Statutes," #233.) A fortiori, a higher sovereignty, and its agencies and instrumentalities, would be deemed excluded from the prohibitions contained in the ordinance. Hence, and independent of any question of encroachment upon supremacy, the ordinance should be construed as containing no prohibition against Federal agents and instrumentalities, actually engaged in Federal business, making use of metered parking spaces without the necessity of depositing parking fees. Such would be so, however,

only in instances where the parking is necessary or appropriate to the functioning of the Federal governmental activity as such, for the presumption of exclusion is applied only so as not to impede the prerogatives of the sovereign.

Further, it is clear that neither the state nor any of its political units have any power to tax the Federal Government or any of its properties or activities. (McCulloch v. Maryland, 4 Wheat. 316.) Assuming that the ordinance in question prescribed a license fee rather than a tax, the question squarely presented is whether such fee may be exacted against agents and instrumentalities of the Federal Government while actually engaged or used in governmental activities.

The Federal Constitution provides that its provisions, and the laws of the United States made in pursuance thereof, "shall be the supreme law of the land." (Article VI.) While within its own sphere the state has police powers of wide scope, it cannot in the exercise thereof encroach upon the supreme powers of the Federal government with regard to rights granted or secured thereto by the Constitution. (New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650, at 661-662.) The state is not only prohibited from directly interfering with the activity itself, but also from imposing conditions upon the employment of any appropriate means of execution which the general government may choose to carry into effect its granted powers. (McCulloch vs. Maryland, supra.)

Since it is manifest that the use of automobiles by the Federal Government is a modern and appropriate means of carrying into execution portions of its supreme powers, such use is cloaked with the same protection from state interference thrown about the primary activities the execution of which is facilitated by the employment of those automobiles. The need to park those automobiles is a necessary corollary to the use thereof, and while parking space is available and open, persons engaged in the actual business of the Federal Government, for and on behalf thereof, could not be held for a parking charge. When such parking becomes necessary or appropriate to the execution of the constitutional powers of the Federal Government, a charge or fee therefor would necessarily be a condition to the right to take such appropriate step in effecting the end of the powers. The same reasoning applies regardless of the ownership of the vehicle so used -- be it owned by the Federal government or the individual agent of the government -- so long as the Federal mission involves the need for parking. The ordinance also provides for possible imprisonment for failure to pay parking charges, and such imprisonment of a Federal agent would clearly encroach upon the expeditious transaction of the governmental business being transacted by him at the time of a violation.

The result of the foregoing, and the purport of this opinion, is not to immunize from the effect of the ordinance all Federal employees or agents driving privately owned automobiles,

but will have application only in instances where, in the transaction of a particular Federal assignment by use of a motor vehicle, parking becomes necessary. It is not enough that the vehicle be operated by a Federal employee, but it must be used in and for a governmental activity. It is the vehicle itself which must be, in effect, in the employ, and used for the purposes of the Government, even though privately owned, and the mere fact of Federal employment of the owner-operator will not suffice.

Opinion is expressly reserved on the issue of whether, in a particular area, a comprehensive and absolute prohibition against parking in general might be enforceable against Federal agents acting in the course of their employment and duties; but, so long as parking is permitted, the right of Federal agents, acting in the performance of their duties, to park in an unoccupied area cannot be conditioned upon payment of a charge, and you are accordingly so advised.

Respectfully submitted,

City Attorney

To: Chief Administrative Officer
WFB

4190

September 28, 1948

SUBJECT: REFUSAL OF DEPARTMENT OR EMPLOYEE TO PROVIDE LICENSE APPLICATION FORMS; BOARD OF PERMIT APPEALS; PEDDLER'S PERMIT.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

REQUEST

"The Board of Permit Appeals request an opinion relative to the following: 'An Application for a peddler's license or permit, was refused an application form by the Police Dept., for the permit or license sought.'

"QUESTION Is the refusal to grant an application form tantamount to a denial of the license or permit?

"Can the Board of Permit Appeals accept an Appeal from the denial of the application hear the matter and render a decision?"

OPINION

It is the duty of the employees and officers of all city and county departments, boards and commissions to give applicants written applications for permits or licenses when requested, provided that an application form has been prepared for such permits or licenses. If an employee or officer refuses upon demand to give an application form to an applicant, it is then the duty of the applicant to write a letter to the department, board or commission involved, applying for a permit or license, as the case may be. This letter, under the circumstances, has the effect and takes the place of the usual written application form. (Newhall v. Industrial Accid. Com'n, 57 Cal. App. 115.) If the department, board or commission fails to act upon an application within a reasonable length of time, an applicant may then take an appeal to the Board of Permit Appeals under Section 39 of the Charter upon the theory that the application has been denied, since a refusal to act is tantamount to a denial of an application. In such a case, it is the duty, of course, of the Board of Permit Appeals to accept the appeal and to proceed as though an application had been regularly denied.

Incidentally, it is the obligation of all employees and officers of the City and County Government to give applicants, without question, written application forms, when such forms have been provided. If they fail to do so, they are remiss in their duty. It is furthermore the obligation of all departments, boards and commissions to act upon applications within a reasonable length of time.

In direct answer to your current problem, please be advised that anapplicant for a peddler's permit, under section 1, Article 1, Part III of the San Francisco Municipal Code, who has been refused an application form, should write a letter directly to the Police Department in care of the Police Chief requesting the issuance of the permit.

Please note that the applicant should not ask for an application form, but should ask for the permit.

In the event that the letter-application is neither denied or granted within fifteen (15) days, which time I deem to be reasonable, the applicant may take an appeal to the Board of Permit Appeals in the usual course, since failure to act is tantamount to a refusal.

Respectfully submitted,

CITY ATTORNEY.

TO: THE BOARD OF PERMIT APPEALS
250 City Hall, San Francisco 2
Attention: Mr. Thomas W. McCarthy, Sec'y.

4191

October 1, 1948

SUBJECT: USE OF STREET IMPROVEMENT BONDS FUND, 1947, FOR REMOVAL OF CERTAIN STREET POLES AND SIGNS AND ERECTION OF STANDARDIZED STREET POLES AND SIGNS

Dear Sir:

I am in receipt of your request for opinion as follows:

> "This office would appreciate receiving a written opinion from you concerning the following query:
>
> "Is it legally possible to use funds from the $22,850,000 Street Improvement Bonds Fund, 1947, to pay the cost of removing useless poles and miscellaneous street signs, located on various street corners, that serve no beneficial purpose, and for the future erection of poles and street signs of a standardized pattern?
>
> "Early receipt of your opinion will be greatly appreciated."

OPINION

Under the resolution of intention (1947, No. 6720) and the ordinance (1947, No. 4609) authorizing submission of the street improvement bonds proposition to the electorate, the broad general purpose of incurring such bonded indebtedness is expressed to be the "improvement" of the streets, highways and public ways of the city and county.

In Vandall v. South San Francisco Dock Co. 40 Cal. 83, the court - in considering the meaning of "improve" as used in a certificate of incorporation with respect to the power to improve real estate - said the following:

> " ..... Worcester defines the word 'improve' to mean, 'to make good use of; to employ advantageously; to increase, augment or enhance, as to that which is evil;" while Webster defines it 'to make better; to advance in value; to use or employ to good purpose; to make productive; to turn to profitable account; to use for advantage.'
>
> .... "

In City and County of San Francisco v. Boyd, 17 Cal. (2) 606, the court - in considering the meaning of "improvement" in connection with the city transit system - declared that "the substitution of any means of transportation for a decayed or outmoded means now in place" would be within the purview of that term. The court in Mullins Mfg. Co. v. Booth, 125 Fed. (2) 660, stated that in its broadest sense the term "improvements" was all-inclusive, and embraced "any advance in the art."

In Ideal Wrapping Machine Co. v. G. Close Co., 23 Fed. (2) 848, the court interpreted "improve" to mean a change so as to effect a better performance of the purposes for which the subject matter was originally intended. In discussing the meaning of "improve" in an ordinance relating to improving a sidewalk, the court in Gocke v. Staebler & McFarland, 132 S.W. 167, stated that the word meant "to make better" or "to increase the value or good qualities of."

On the authority of the foregoing judicial interpretations of the word "improve", an "improvement" of the streets, highways and public ways - within the scope of possible expenditures from the fund in question - would encompass any removal, alteration or construction in, upon or over the streets and ways which would increase the value or facilitate the use of such streets as media for the passage of traffic, both vehicular and pedestrian; such purpose of traffic or travel being the primary reason for the creation and maintaining of public streets. (4 McQuillan, Municipal Corporations (2nd Ed., Rev.) 10) The fact that such work may be done in or upon the sidewalks does not compel a contrary conclusion, for it is held in Marini v. Graham, 67 Cal. 130, that the "sidewalks" of a public street of a city are parts of the "street".

Removal of poles and street signs which are useless and serve no beneficial purpose would be an improvement of the public streets because such removal would eliminate definite obstructions to more complete and convenient travel; and the erection of such standardized poles and street signs as would operate to the advantage of the traveling public would likewise enhance the "travel value" of the streets, and thus be an improvement.

In view of the foregoing, you are advised that the fund in question may be used for the purposes enumerated in your request for opinion.

Respectfully submitted,

JOHN J. O'TOOLE

City Attorney

To: Board of Supervisors
Attn: Mr. John R. McGrath

cc to The Mayor

WFB

4192

October 13, 1948

SUBJECT: RIGHT TO EXECUTE ON JUDGMENT AGAINST THE CITY AND COUNTY (Judgment of Dion R. Holm).

Dear Sirs:

I am in receipt of your letter wherein you request the following information:

"(1) Is the City and County of San Francisco required to pay the judgment rendered against the City and County and in favor of Dion R. Holm, Special Counsel, Water Service?

"(2) Can Mr. Holm execute on his judgment against the City and County of San Francisco without any action on the part of the Board of Supervisors?"

O P I N I O N

Before we go into the law on the case, we should possibly understand fully the facts which pertain to this particular litigation. It dates back to a day when the City and County acquired the properties of the Spring Valley Water Company and proceeded to utilize them for a municipal water supply.

One of the powers vested in the Board of Public Works under the old Charter was the right to regulate the operation of all municipally-owned utilities in accordance with such ordinances as the Board of Supervisors might enact. Upon the acquisition of the properties of the Spring Valley Water Company, it became the duty of the Board of Supervisors to enact an ordinance providing for the manner in which this particular utility should be operated. The Board, by Ordinance No. 8691, set up a complete scheme for the operation of the properties acquired from the Spring Valley Water Company. Section 10 of said Ordinance No. 8691 read as follows:

"The City Attorney shall be the legal adviser of the Department and shall render such legal services as the Board of Public Works, or the head of the Department, may deem necessary and shall prosecute and defend all actions and proceedings affecting or involving the Water Department. He shall, when necessary, upon the request of the Board of Public Works, appoint and detail one or more attorneys to perform the duties herein specified and the compensation of said attorneys so detailed shall be approved by the Board of Public Works and fixed by the Board of Supervisors and shall be paid by the Board of Public Works from the revenues of the Water Department as an operating expense."

Thereafter, the Board of Supervisors, on March 17, 1930, adopted Resolution No. 32 200, approving the appointment by the City Attorney of Dion R. Holm, as Special Counsel for the Water Department, and recommended the payment of a salary of $12,000.00 per year, payable in equal monthly installments.

Upon said resolution becoming effective, Mr. Holm assumed the duties as Chief Counsel for the Water Department at a salary of $12,000.00 per year and continued to receive said salary until June 30, 1932. At that time, the new Charter having become effective, the Public Utilities Commission had jurisdiction over all utilities, including the San Francisco Water Department, and in the budget which became effective on July 1, 1932, saw fit to fix Mr. Holm's salary at $10,000.00 a year, notwithstanding the fact that the new Charter provided:

> "If any compensation paid on January 1, 1931, is higher than the current compensation fixed as provided in this section for such position or incumbent, said compensation shall be continued to the incumbent of such position as long as he legally holds such position."

Mr. Holm continued to occupy the position as Chief Counsel for the Water Department from the date of his appointment to July 1, 1946, at a salary of $10,000.00 per year, which was $2,000.00 per year lower than the salary fixed when he received the appointment and which he was receiving on January 1, 1931.

On August 28, 1946, Mr. Holm filed with the Controller a claim in the sum of $26,691.00 as a difference in the salary which he received on the effective date of the new Charter and which he was paid from that date until the date of filing the claim. The claim was disallowed and in due course Mr. Holm commenced suit in the Superior Court to recover the amount of his claim. The City Attorney advised the Public Utilities Commission that he would prefer that the Commission obtain special and independent counsel to represent it in the litigation. This the Commission did and appointed Marshall E. Leahy to act as its counsel in the whole litigation. Mr. Holm was represented by Messrs. Ehrman, White and McAuliffe. A taxpayer intervened, representing the taxpayers and objecting to the payment of Mr. Holm's claim. The case was tried for four or five days before Judge Schonfeld and Messrs. Ehrman, White and McAuliffe represented Mr. Holm, Mr. Marshall E. Leahy represented the Commission, and Mr. Edward Heavy represented as an intervening taxpayer. The matter was completely briefed by all interested counsel and a judgment of $26,718.50 was awarded in favor of Mr. Holm and against the City and County.

By special resolution of the Public Utilities Commission, the City Attorney and its special counsel were requested not to take any appeal from the judgment. An appeal was, however, taken by the intervening taxpayer but was not perfected and by stipulation was finally dismissed. Therefore, the judgment of Mr. Holm, of $26,718.50, together with such interest as may be due thereon, is now due to Mr. Holm.

The Controller certified to the Board of Supervisors that funds are available to pay this judgment and therefore the only questions to be determined are those contained in your inquiry above set forth.

THE LAW

In your letter you have asked two questions:

> "(1) Is the City and County of San Francisco required to pay the judgment rendered against the City and County and in favor of Dion R. Holm, Special Counsel, Water Service.
>
> "(2) Can Mr. Holm execute on his judgment against the City and County of San Francisco without any action on the part of the Board of Supervisors."

Answering your first question be advised that the time for appeal against this judgment has now expired and on the express recommendation of the Public Utilities Commission, no appeal was taken from the judgment. Therefore, the judgment is valid against the City and may be enforced under certain conditions by an execution issued against the property of the City and if not paid as the result of the execution it must be paid in ten annual installments as provided by the Act of the Legislature adopted in 1901 and found at page 794 of the Statutes of that year. It is provided by this Act that it shall be the duty of the Board of Supervisors or other governing body of the municipality to pay the amount of the judgment in full or at least 1/10th thereof, and the balance in nine equal installments with interest at the rate of 7% per annum. This means that the payment of at least 1/10th of the amount of the judgment is mandatory and the remaining nine installments with 7% interest must be paid at the rate of one installment each year. This office has had a great deal of experience in the paying of judgments on this installment plan and it adds practically 38.5% to the amount of the judgment over a period of ten years, and while the City was paying judgments recovered for back taxes, we found that this additional charge was rather a heavy burden upon the City. Therefore, it can be definitely said, that either the judgment to Mr. Holm must be paid in full at once or paid in installments over a period of ten years.

Your next question is as to whether or not Mr. Holm can execute on his judgment. Let it be remembered that the Controller has certified that the funds are available to pay this judgment and in all probability a mandate would lie against the Board to approve a demand for the payment of the judgment. Ordinarily, property owned by a municipality is exempt from execution, but this does not apply in all cases. In the first place, if there are moneys on hand which are not needed for other purposes, such moneys may be levied upon. While property municipally owned for governmental purposes and in most cases for proprietary purposes is exempt from execution, the exemption does not in all cases attach to the income of the property. In the case of Kubach vs. City of Long Beach, 8 C. A. (2d), page 267, the Court distinguishes between the right to execute against the property of a municipality and against the income thereof. In this

particular case it refused to permit execution against property owned by the City in its governmental capacity or proprietary capacity and used for water department purposes, but did permit an execution against the royalties arising from a sub-surface lease of the water department properties, although the property itself was actually used as a place for the storage of water. The Court held that as long as the City was authorized by the Constitution of the State to distribute water to its inhabitants, property used in that regard was not subject to execution for the reason that the execution would interfere with the Constitutional rights granted to the City, but that this exemption did not apply to the income of the property. Undoubtedly it would be difficult to execute against property owned by the City in its governmental or proprietary capacity unless it could be shown that these properties were not necessary for either purpose, but there is no question in my mind that the income from many of the properties of the City, especially of the Water Department, which are rented either on shares or on a cash rental basis, would be subject to execution on Mr. Holm's judgment. I therefore advise that Mr. Holm has valid judgment against the City which may be enforced on the installment plan of 10% per year, which, as I have said, will add something over 38% to the principle of the judgment and that if the Board does not see fit to make provision for the payment of this judgment the revenues received from many of the properties of the City, especially those held in a proprietary capacity, would be subject to execution to satisfy the judgment.

Respectfully submitted,

CITY ATTORNEY

To: Finance Committee, Board of Supervisors
The Mayor

JJO'T

4193

October 4, 1948

SUBJECT: APPLICATION OF SECTION 884 OF WELFARE AND INSTITUTIONS CODE WITH RESPECT TO MINOR AND ORDINARY ROUTINE MEDICATIONS OF WARDS

Dear Sir:

I am in receipt of your request for opinion as follows:

"A question has arisen relative to administering to the minor medical needs of wards of the Juvenile Court committed to the private agencies of San Francisco as authorized in paragraph (b) of Section 740 of the Welfare and Institutions Code. Under the provisions of Section 884 of the Welfare and Institutions Code the Judge of the Juvenile Court may, upon receiving the written recommendation of a qualified physician, make an order authorizing performance of necessary medical, surgical or dental care, when there is no parent, guardian or person standing in loco parentis capable or willing to make such authorization. It frequently develops, however, that wards committed to the care of private agencies, and placed by them in foster homes and institutions, need simple, routine medications such as are common to the medicine cabinet in the average home, e. g., aspirin, nose drops, cough syrups, cathartics, and the like for treatment of headaches, upset stomach, common head colds, etc., which are cumbersome to administer if Section 884 is to be strictly observed.

"Although it is not to be argued that the agencies to whom the Juvenile Court commits its wards for care and supervision in foster homes and institutions are not standing strictly "in loco parentis" under the provisions of Section 884, this department believes that considerable latitude in common sense and ordinary discretion must necessarily be reposed in the agencies, as well as in foster parents and institutions, if our wards are to receive good overall general care commensurate with the spirit expressed and implied in the Welfare and Institutions Code. We are of the belief that absolute adherence to Section 884 in minor physical illnesses is not intended for situations as described above and it will be appreciated if we may have your opinion on the matter."

Section 884 of the Welfare and Institutions Code provides as follows:

"Sec. 884. Minor in need of medical, etc., care: Order of court: Right of parent or guardian not limited. Whenever it appears to the juvenile court that any person concerning whom a petition has been filed in said court alleging that said person comes within the provision of Section 700 of this code, is in need of medical, surgical or dental care, and that there is no parent, guardian or person standing in loco parentis capable or willing to authorize remedial care or treatment for such person, the court, upon the written recommendation of a qualified physician, and after due notice to the parent, guardian or person standing in loco parentis, if any, may make an order authorizing the performance of the necessary medical, surgical or dental care for said person. Nothing in this section, however, shall be construed as limiting the right of a parent, guardian or person standing in loco parentis in providing any medical or other remedial treatment recognized or permitted under the laws of this State."

To hold that strict adherence of the above cited section is necessary for the giving of an aspirin, cough medicine, cathartics and the right for treatment of headaches, upset stomach, and common colds, would lead to the unreasonable result of obtaining a court order for such administrations. It is a general rule of statutory construction that where an adherence to the strict letter or usual meaning would lead to an absurdity or an unreasonable conclusion, the general intention of the Legislature will control the strict letter of the Statute.

An interpretation should be applied which is within the reason and spirit of the Statute or public policy which animates it. In view of the following it is my opinion that the Legislature never intended that this section would be applied to the situations as described in your letter but that the medical care contemplated by the Statute is for those situations that require treatment or attention of physicians or surgeons.

As noted above, this opinion is directed solely to those situations which require minor ordinary routine medications. I would suggest in closing that your office initiate the necessary steps to amend Section 884 of the Welfare and Institutions Code to provide for emergency operations or treatment upon the advice of a qualified physician or surgeon without notice to parent, guardian or person standing in loco parentis when it is not feasible to give such notice and without the necessity of a court order where time does not permit the obtaining of such an order.

Respectfully submitted,

City Attorney

To: Chief Probation Officer

4194

October 14, 1948

SUBJECT: APPLICATION OF CHARITABLE ORGANIZATION TO SOLICIT FUNDS FOR MEMBERSHIPS

Dear Sirs:

I am in receipt of your communication which reads as follows:

> "Request has been made to the Board of Supervisors by the Community Welfare and Taxpayers Association that a permit be granted said organization to solicit memberships in San Francisco pursuant to and in conformity with Section 219 of the Welfare and Institutions Code of the State of California.
>
> "Section 590 et seq. of the Police Code regulate charitable solicitations in the City and County of San Francisco, and you are hereby respectfully requested to advise this office whether these sections or the provisions of the Welfare and Institutions Code are controlling."

In addition to the above you have forwarded to me two letters received by your Board from the Community Welfare and Taxpayers Association, one under date of September 7th and the other under date of October 13th of the present year. They both refer to the same subject and the general purport of the inquiry is: Shall the Community Welfare and Taxpayers Association be permitted to solicit memberships in its Association for the purpose of carrying on its work in the City and County of San Francisco. In neither one of the communications addressed to your Board is any indication given as to the exact nature of the work which is being carried on by this Association, the letters referring to the work being rather general in character. All your communications, with the exception of the one addressed to me by your Board, are herewith returned.

O P I N I O N

The matter of your inquiry is covered by Article 9, Chapter 8 of the Police Code insofar as it is one of local regulation, but I am of the opinion that the State has taken over the whole field of regulating these charitable appeals and therefore the State law and not the local ordinance governs their operation. The matter is cared for in the Welfare and Institutions Code and I am of the opinion that all local ordinances can do, is add to the provisions of the Code. Possibly this is all that our local ordinances do, but before referring to the local ordinances, the provisions of the Welfare and Institutions Code must be followed. Section 219 of the Welfare and Institutions Code provides as follows:

"It is unlawful in any county to make any appeal to the public for a charity by soliciting donations or subscriptions, by promoting any bazaar, sale, or exhibition, or by any similar means, unless the charity is registered with the county board of public welfare or with the board of supervisors.

"Any person, firm, or corporation making any such unlawful appeal is guilty of a misdemeanor.

"The provisions of this section shall not apply to the solicitation of gifts, contributions, or donations for religious purposes, or for specific personal aid to any particular individual or individuals, or for meeting extraordinary emergencies or calamities where time is of the essence of merited succor and relief."

The following Section 220 provides:

"Any charity may be registered with the county board of public welfare or, if there is no such board in the county, with the board of supervisors, upon giving such information in respect to the conduct of its affairs as may be necessary to enable the board properly to investigate the charity."

Therefore, I am of the opinion that before any permit could be given to this Association to solicit memberships, the Board should hold an investigation and ascertain the character of the organization and to what extent the amount received by the organization can be made applicable to charitable work in hand. I have made inquiry at the Public Welfare Department of the City and County of San Francisco and have ascertained that this agency is not registered with them as a charitable agency doing work in the City and County of San Francisco. This information has not been completely checked and I received it only over the telephone. However, I am of the opinion that before any solicitation is permitted by this agency, a complete investigation should be made by the proper committee of your Board and due consideration should be given to the character of the work which it is performing, the amount of the subscriptions which actually go to that work and what use is made of the balance of the subscriptions. I think this is particularly proper by reason of the provisions of Article 9 of the Police Code which deals with similar matters, and

your attention is particularly called to subdivisions (a), (b) and (c) of Section 591 of the Police Code and especially to the following language in subdivision (d) of said Section 591 which requires a financial statement from the applicant setting forth the following facts:

> "(1) The amount of any wages, fees, commission, costs, expenses or emoluments to be expended or paid in connection with any solicitation for funds.
>
> (2) A statement of all funds received and disbursed by said applicant during the calendar year next immediately preceding the filing of said application.
>
> (3) All funds received or collected by public solicitation or otherwise during the preceding calendar year.
>
> (4) The purposes for which the funds proposed to be solicited are to be expended together with a budget of said applicant for the calendar year next immediately succeeding the date of said application."

I believe that these conditions are supplemental to the State law and do not in any way infringe on the provisions of the Welfare and Institutions Code and that local legislation may go this far without trespassing upon the provisions of the Code. I therefore conclude that it would be advisable to refer this application to the Chief of Police for investigation to the end that your Board may be fully advised in the premises and make sure that this institution is not duplicating any of the work done by our local agencies.

Respectfully submitted,

CITY ATTORNEY

To: Board of Supervisors
CC The Mayor
JJO'T

4195

October 22, 1948

Subject: Rates for Municipal Railway require two-thirds vote when tax moneys are used.

Dear Sir:

The Public Utilities Commission by its Resolution No. 9310 has submitted to you a schedule of rates to be charged by the Municipal Railway, and under its Resolution No. 9319 states the date upon which the increases in fares shall be put into effect will be December 1, 1948. With the resolutions referred to there was a report from the Manager of Utilities and Manager of the Municipal Railway, dated September 20, 1948, and in Exhibit "B" of this study is set out estimated results of the proposed revenue adjustment, assuming the new rates were to go into effect December 1, 1948.

You have asked the following question:

> "Is it necessary, in order for the Board of Supervisors to approve the schedule contained in said resolution of the Public Utilities Commission, that the Board adopt a resolution by a two-thirds affirmative vote?"

OPINION

In reviewing the study of September 20, with the new fares effective December 1 there would be an estimated surplus on hand at the close of the fiscal year in the sum of $1,546,233. The latter sum is deduced after taking into consideration, under "Receipts," two items, one in the sum of $728,030 derived from Use Tax and $1,776,703 derived from ad valorem tax.

It thus appears that to realize the surplus of $1,546,233 at the end of the fiscal year, credit would have to be given to receipts realized from ad valorem tax. Hence it becomes evident that the 10-cent straight fare does not yield sufficient money to pay all expenses of every kind and nature incident to the operation and maintenance of the utility without resorting to the tax moneys. In short, the surplus of $1,546,233 is realized wholly from the ad valorem tax item under "Receipts" of $1,776,703.

Under the fourth paragraph of section 130 of the Charter the following language is used:

> " * * * provided that, should the commission propose a schedule of rates, charges or fares for said utility which shall not produce such revenue, it may do so with the approval of the board of supervisors, by a two-thirds vote and it shall thereupon be incumbent to provide by tax levy for the additional amount necessary to meet such deficit."

As it has been illustrated from Exhibit "B" that the surplus is derived from tax money and without the tax money there would be a deficit, it would require a two-thirds vote of the Board of Supervisors to approve the schedule of fares submitted by the Public Utilities Commission under its Resolution No. 9319.

Respectfully submitted,

JOHN J. O'TOOLE, City Attorney

By _____

DION R. HOLM
Assistant City Attorney

To: Honorable Dan Gallagher
Board of Supervisors

DRH

4196

October 27, 1948

SUBJECT: REENACTMENT OF A GENERAL CHARTER PROVISION WITHOUT CHANGE DOES NOT REPEAL BY IMPLICATION A PARTICULAR PROVISION.

Gentlemen:

A question has been raised as to Proposition K on the ballot in the election to be held on November 2, 1948, and you have requested an opinion respecting it.

Proposition K proposes to amend Section 11 of the Charter by deleting from the first sentence the words "municipal" and "including municipal court judges", as indicated by double parentheses, as follows:

> "Section 11. Any elective ((municipal)) officer, ((including municipal court judges,)) and any member of the civil service commission or public utilities commission or school board may be suspended by the mayor and removed by the board of supervisors for official misconduct, and the mayor shall appoint a qualified person to discharge the duties of the office during the period of suspension."

The remainder of Section 11 is set forth in the proposed amendment without change.

The first sentence of the third paragraph of this section is as follows:

> "Any appointee of the mayor, exclusive of civil service and public utilities commissioners, and members of the school board, may be removed by the mayor."

This sentence is not changed by the amendment.

Attention is called to Section 61.1 of the Charter, enacted in 1937, relating to the Public Welfare Department, and particularly to Subdivision 4 of this section, relating to removal of public welfare commissioners from office. This subdivision is as follows:

> "Subdivision 4. Members of the commission shall be subject to removal from office by the mayor for cause, but only upon written charges made and signed by the mayor, copy of said charges to be served upon the offending commissioner; and said charges shall be heard by the mayor and on said hearing of said charges the said commissioner so charged shall have the opportunity to appear and to be heard."

The contention is made that, on adoption of Proposition K, an implied repeal might be held to be effected of subdivision 4 of Section 61.1 by virtue of the reenactment of the unchanged sentence of Section 11 quoted above.

O P I N I O N

Section 11 is a general provision on the subject of suspension and removal of officers. Section 61.1 is a particular provision relating exclusively to the Public Welfare Department. The proposed amendment of Section 11 relates to matters not in any way connected with the subject matter of Section 11. The mere reenactment of the remainder of the section would not have the effect of an implied repeal in any respect of Section 61.1.

> "Repeals by implication are not favored. A statute will not be construed as repealing prior acts on the same subject in the absence of words to that effect unless there is an irreconcilable repugnancy between them or unless the new law is evidently intended to supersede all prior acts relating to the legislation and to comprise in itself the sole and complete system of legislation upon the subject."

> "It seems to us manifest by re-enacting the provision in 1931 it was never intended in any manner to affect the provision of the Dental Act requiring its secretary to be a member of the board."

Boyd v. Huntington, 215 Cal. 473, 481, 482.

The reenactment of the unchanged portions of Section 11 is not to be deemed a new enactment, but to be a continuation of the former one as to all such provisions.

> "An examination of the statute embracing said amendment shows that the provisions of the section as it originally read are retained and re-enacted down to the place of insertion of said amendment, and under well-settled principles of statutory interpretation must be held to have been continued in force with whatever interpretation the courts had theretofore placed upon the scope and meaning thereof, unless the amendment itself purports to work a change in the scope and meaning of the terms of the original section as thus judiciously interpreted."

Blodget v. Superior Court, 210 Cal., 1, 12.

See also:

Federoff v. Birks Bros., 75 C. A. 345, 348, 349.

A specific statute controls a general one and a general statute will not repeal a specific one by implication unless the intent to do so is clear.

"A specific statute upon a subject controls over a general provision. (People v. Moroney, supra.) And 'a general statute will not repeal by implication a former one which is special or which is limited in its application unless there is something in the general law that makes it manifest that the legislature contemplated and intended a repeal.' (Boyd v. Huntington, 215 Cal. 473, 482 (11 P. 2d 383).)"

Div. of Labor Law Enforcement v. Moroney, 28 Cal. 2d, 344, 346.

The specific procedure in Section 61.1 of the Charter providing for removal of the members of the Public Welfare Commission for cause is not in any way affected nor are the Mayor's powers of removal broadened by the reenactment of the provisions of Section 11 with minor deletions as proposed in Proposition K.

This proposal was originally prepared as a part of a proposed general charter revision program and not as a separate amendment, but the proposition is clear as it stands, its purpose is good and it should be enacted. We appreciate of course the civic interest of the alert, patriotic organization which presented the question upon which you have requested our opinion.

Respectfully submitted,

CITY ATTORNEY

To: Board of Supervisors

cc: Mayor
WP/f

4 19.7

October 28, 1948

SUBJECT: RECREATION COMMISSION: REVENUE TO CITY FROM CONCESSION AT SIGMUND STERN GROVE MUST BE MADE SUBJECT OF APPROPRIATION ORDINANCE BEFORE MONEY CAN BE EXPENDED FOR GROVE MUSIC FESTIVAL

Gentlemen:

I am in receipt of your communication which reads as follows:

"As you know, each year the Recreation Commission sponsors a series of free midsummer concerts, under the direction of the Sigmund Stern Grove Music Festival Association. In the main, these concerts are financed by private contributions and at considerable expense to the Music Festival Association.

"For the convenience of the thousands who attend these weekly concerts, a concessionaire, under an agreement with the Recreation Commission, is permitted to operate a refreshment stand, for which he pays 10 per cent of his gross revenue.

"Operation costs for these programs have steadily increased, and in order to relieve the financial burden on the Association, and to insure continued high quality, the suggestion has been made that perhaps an ordinance might be drawn whereby the concession revenue could be assigned to the Sigmund Stern Grove Music Festival Association.

"Might I ask that you discuss this possibility with Mr. Ross, and if he is in agreement with the suggestion prepare the necessary ordinance."

O P I N I O N

The revenue to the City and County from the concession at Sigmund Stern Grove cannot as such be assigned, transferred or expended. Under Section 82 of the Charter all moneys received by any officer or employee of the City and County shall be paid to the office of the Treasurer of the City and County and disbursement of all such funds shall be made only on warrants drawn by the Controller. Under Sections 85 and 86 of the Charter no money shall be drawn from the Treasury nor shall any obligation for the expenditure of any money be incurred except in pursuance of appropriations or transfers made as provided in the Charter. The Controller must certify that there is a sufficient unencumbered balance in a fund that may legally

be used for such proposed expenditure.

An appropriation of the moneys referred to in your letter must be created by ordinance before the proposed expenditure can be made. This can be accomplished either by the annual appropriation ordinance as provided in Section 72 of the Charter or by supplemental appropriation ordinance as provided in Section 80 of the Charter. In the event a supplemental appropriation ordinance is desired you are referred to the following qualifications and procedure as set forth in Section 80 of the Charter:

> ".....revenues collected or accruing from any source during any such fiscal year, in excess of the estimated revenue from such source as shown by the annual budget and the appropriation ordinance for such fiscal year ..... may be appropriated by the board of supervisors at the last meeting of such board in any month, by means of an ordinance designated as a supplemental appropriation ordinance, on the recommendation of the chief administrative officer, or any board, commission or elective officer, respectively, and the approval and submission by the mayor of a supplemental budget estimate or request, in the same manner and subject to the same conditions, except time, as provided in this charter for the submission and approval of the annual budget and the appropriation ordinance."

It is my opinion, therefore, that revenues received from the concession at Sigmund Stern Grove cannot as such be assigned, transferred or expended by the Recreation Commission. The revenue from the concession must be ascertained and determined and be made subject of appropriation ordinance before the money can be expended for any purpose.

Respectfully submitted,

CITY ATTORNEY

To: Recreation Commission
T.M.O'C

4-198

October 29, 1948

Subject: San Mateo Route No. 40 May be Abandoned; Procedure.

Gentlemen:

You have asked the question if the Commission has the legal right to discontinue street railway service between San Francisco and San Mateo County.

Facts hereinafter stated are well known to the members of the Commission but in order that the opinion may be understood by those not familiar with the facts, they will be recited in some detail.

OPINION

The Municipal Railway operates Route No. 40 between San Francisco and the City of San Mateo in San Mateo County known as the No. 40 Line. It is operated along Mission Street to the San Mateo County line and then from this point to Cypress Lawn Cemetery by virtue of a franchise granted by the County of San Mateo to the City's predecessors in interest prior to city governments being formed in Daly City and Colma. Thence over land largely owned by San Francisco to Burlingame. From Burlingame it traverses city streets in Burlingame and San Mateo and has as its terminal a place opposite the Southern Pacific Station in the City of San Mateo.

The people along the course of the No. 40 Line are also served by Pacific Greyhound system of buses that offers several routes reaching all communities served by the No. 40 Line. In addition, the Southern Pacific Company from San Bruno south to San Mateo conveys passengers between these termini and into San Francisco. Another privately-owned bus system serves all communities from South San Francisco to San Mateo. In point of service, from facts submitted to this office, the Municipal Railway is the slowest.

Throughout the route traversed by the No. 40 Line in San Mateo County, and this statement is made without unduly prolonging this opinion by noting exceptions, from Cypress Lawn Cemetery to Burlingame Avenue the City owns the fee, which varies in width from a minimum of 30 feet to a maximum of 60 feet. Along the route are encountered publicly-owned streets and highways, and the City has acquired the right to cross these from the various townships in which the streets are located.

The fee to the land described and the franchises which were issued by the County of San Mateo to operate the

railway were conveyed to the City from Market Street Railway Company by deed dated September 29, 1944. A substantial sum of money was paid for the lands and appurtenances covering Route No. 40. One franchise will expire in 1950 and the other in 1952.

Another fact brought to the attention of this office is that the No. 40 Line during the last fiscal year was operated at a loss of $123,639.68, or at the rate of $340 per day. We are further advised that the losses for the current fiscal year are approximately the same.

Under section 121 of the Charter, this Commission has full control of the construction, management, supervision, maintenance, extension, operation and control of all public utilities owned by the City and County. If Line No. 40 were owned by a private company, application would be made to the State Public Utilities Commission for leave to abandon it. Although the Public Utilities Commission of the State has no authority to cancel a franchise (People v. Northwestern Pacific, 20 Cal. App. (2d) 120,)the technical question of cancelling the franchise would be decided by the Courts,(City of Oakland v. Key System, 64 Cal. App. (2d) 427) but the necessity of the line would be determined by the Commission.

The City and County of San Francisco has never submitted itself to the jurisdiction of the State Public Utilities Commission as is provided for in Article XII, Section 23 of the Constitution. The Charter of San Francisco was ratified by the Legislature and is therefore considered with the same dignity as any statute enacted by the State Legislature, and the Courts so construe our Charter. Section 132.1 of the Charter provides that when merger of the San Francisco Municipal Railway with any privately-owned street railway system is effected, (a merger has been accomplished with the properties of the Market Street Railway and Route No. 40 was one of Market Street's lines,) no line of street railway as well as other type of conveyance or any portions thereof shall be abandoned except upon recommendation by the Public Utilities Commission, in writing, to the Board of Supervisors.

The section goes on to provide that the board shall act upon the recommendation within thirty days. The board conducts a public hearing and if the recommendation is disapproved by at least nine votes, the Commission may not abandon the route. There is an exception in this section that is made to lines that have been operated for less than a year.

If the Commission should find as a matter of fact that the service rendered by the No. 40 Line is largely a

duplicate service to the communities benefited and finds to be a fact that the representations made to this office that a loss of $340 a day is suffered by the City in the operation of this route, you would be justified legally in recommending to the Board of Supervisors that the line be abandoned.

It would appear to me that the financial loss should be, in the eyes of a court, a very potent reason for your contemplated action, especially when it is common knowledge that a portion of the operating expenses of the Municipal Railway is currently supplied by funds realized from taxes.

The franchises are silent as to any penalty that may be invoked against the City by reason of abandoning the route in question and there does not appear anything in the franchises from which the law could imply a liability against the City in the event you abandon these franchises and ceased operation. The only loss to the City would be the franchises themselves.

A proper procedure would be to notify the Board of Supervisors of the County of San Mateo and the Councilmen of the City of San Mateo of your intention to abandon Route No. 40.

Respectfully submitted,

DION R. HOLM
Public Utilities Counsel

To:

PUBLIC UTILITIES COMMISSION

DRH

November 1, 1948

SUBJECT: POLICYMAKING POWER OF THE BOARD OF SUPERVISORS RESPECTING SINGLE ABLE-BODIED MEN: PUBLIC WELFARE DEPARTMENT, CHARTER SECTION 61.1.

Gentlemen:

You have requested an opinion as follows:

"What authority, if any, does the Board of Supervisors have with respect to determining policy for the granting of relief by the Public Welfare Department to single able-bodied men?"

OPINION

The authority of the Board of Supervisors in determining policy as to relief in general depends on several considerations.

First, the granting of relief is a state affair, a matter of state-wide interest, and is not a municipal affair. It is therefore subject to the control of state law so far as any exists on the subject.

This proposition is stated in San Francisco v. Collins, 216 Cal. 187, at pages 191 and 192 as follows:

"The duty to relieve the indigent, established by state statute, is likewise a matter of state-wide interest, in which the city and county of San Francisco is governed by the general law, and acts as a county--an agent of the state. (See County of Sacramento v. Chambers, 53 Cal.App. 142 (164 Pac.813).)"
"It follows that no inconsistent provisions in the San Francisco municipal charter could limit the performance of these county functions."

The City and County of San Francisco is thus the agent of the State of California in the administration of relief. Numerous statutes particularize the duties thus imposed on the city and county. Powers and duties in the premises are also frequently specifically imposed on the Board of Supervisors. Sections 200 and 2500 and part of Section 2506 of the Welfare and Institutions Code are important in this connection and are as follows:

"§200. Indigent sick or dependent poor: County boards of supervisors may care for: Taxes. Under such limitations and restrictions as are prescribed by law, and in addition to jurisdiction and powers otherwise conferred, the boards of supervisors in each county may provide for the care and maintenance of the indigent sick or dependent poor of the county, and for that purpose may levy the necessary property or poll taxes, or both."
"§2500. Persons to whom duty extends. Every county and every city and county shall relieve and support all incompetent, poor, indigent persons and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, or by their own means, or by State hospitals or other State or private institutions."

"§2506. Supervisors to investigate relief applications, supervise recipients and keep records thereof: Persons entitled to inspect records: Rights of citizens to relief information. The board of supervisors of every county as a board, or by committee or by such person or society as it may authorize, shall investigate every application for relief from the funds of the county, shall supervise by periodic visitation every person receiving such relief, shall devise ways and means for bringing persons unable to maintain themselves to self-support and shall keep full and complete records of such investigation, supervision, relief, and rehabilitation as shall be prescribed by the State Department of Social Welfare."

Second, comes the inquiry as to what the City and County, and particularly the Board of Supervisors, has done in the determination of policy in the administration of these state-wide duties.

In the year 1929, by Ordinance No. 8542, (Journal of Board of Supervisors 1929, page 1834) the Board of Supervisors gave the County Welfare Department certain powers of investigation to be exercised on behalf of the Board.

In the year 1934, by Ordinance No. 19.07120 (Bill 615) the Board of Supervisors created a Citizen's Emergency Relief Committee, to be appointed by the Mayor. The Board charged this committee with responsibility for distribution of all funds made available for the relief of the dependent poor of the City and County and of those entitled who were made needy by reason of unemployment.

In the year 1937, the Board of Supervisors ordered submitted to the voters a charter amendment, now Section 61.1, adopted and ratified in that year, setting up a Public Welfare Department for the administration of relief. The functions of the County Welfare Department and of the Citizens' Emergency Relief Committee were incorporated by this amendment in the Public Welfare Department thus created.

A Public Welfare Commission was created by this new Section 61.1. By Subdivision 5 of the section, the Commission is stated to be "a policy-determining and supervisory body."

Were the granting of relief a municipal affair, Subdivision 5 would point the answer conclusively to your inquiry. But it is a state affair and one as to which any conflicting municipal charter provision must give way to state law. (See San Francisco v. Collins, supra). We do not regard the provisions of state law and the charter as being in conflict, however, and it is our duty to harmonize them if that is possible.

Our conclusion is that the Public Welfare Commission is the agent of the Board of Supervisors, as well as of the City and County, in the performance of its functions, that the charter given policy-determining powers of the Public Welfare Commission are not superior to the state given powers of the Board of Supervisors as stated in Section 200, Welfare and Institutions Code, and elsewhere, but are in aid of them, and that, if the Board of Supervisors considers any policy in this regard, it will do so after report and hearing of the Public Welfare Commission on the subject.

The powers of the Board of Supervisors are therefore complete in this regard, except as they are subject to state law.

Third, comes the inquiry as to the limitations imposed by state law on the granting of relief. Article IV, Section 31, Constitution, prohibits gifts of public money to private individuals, unless such funds are expended for a public purpose. (Patrick v. Riley, 209 Cal. 350). A private purpose, no matter how worthy, does not justify such an expenditure.

Sections 200 and 2500, supra, declare a public purpose which is made mandatory, in the latter section, upon the City and County. The question is as to their application. In this regard, the Supreme Court stated in 1932 in San Francisco v. Collins, supra, as follows:

> "There can be no question as to the applicability of the first statute, giving power to a county, and the second statute, imposing a duty on the county or city and county, to the existing situation, where large numbers of persons have become indigent through unemployment. The statutes are neither in terms nor spirit limited to the relief of chronic or permanent paupers, or any other class of poor persons, but extend to every person coming within the terms of the statute dependent upon public assistance for the necessities of life."

The question in each case as to persons otherwise coming within the terms of the statute is whether they are dependent upon public assistance for the necessities of life. No exception is made of a single able-bodied man. If he comes within the statute otherwise, and is without means and is unable to support himself, he is a proper subject of relief. The maintenance of the public health and public morals make his support a public purpose. It should be pointed out, however, that the person to be helped must be dependent upon public assistance. If self-supporting work is available to an able-bodied person, he is not a proper subject of relief.

These fundamental principles have been stated in the works of general law on the subject as follows:

> "The terms 'pauper', 'poor'; 'poor person', 'indigent person', 'person in distress', etc., in statutes providing for relief of such persons, are used to describe that class of persons who are so destitute and helpless as to be dependent for their support on public charity."

48 Corpus Juris. 428.

"Ability of self-support. A person who is unable to provide for and maintain himself is a pauper, at least prima facie, and entitled to relief."

48 Corpus Juris. 429.

"The words 'pauper' and 'indigent' convey the meaning that the person has neither money nor estate, is without credit, and is unable to maintain himself because of inability to work or obtain employment."

21 Ruling Case Law 704.

"Possibility of Employment. An able-bodied man, who can, if he chooses, obtain employment which will enable him to maintain himself and his family, but refuses to accept that employment, is not entitled to public relief, though relief may be properly extended to the wives and children of such men."

21 Ruling Case Law 705.

In conclusion, I therefore advise that you have authority to determine fully policy for the granting of relief to single, able-bodied men coming within the terms of Section 2500, supra, and other details of state law, provided they are actually destitute and unable to maintain themselves by lawful work. If these conditions do not prevail, you may not authorize the expenditure of public funds for such purpose. You should, as previously stated, have before you the report and recommendations on the subject of the Public Welfare Commission in conformity with Subdivision 5 of Section 61.1 of the Charter.

Respectfully submitted,

JNO. J. O'TOOLE

CITY ATTORNEY

To: Board of Supervisors

cc: Mayor

WP/f

4200

November 4, 1948

SUBJECT: IN RE USE OF MISSION PARK BY JEHOVAH'S WITNESSES AND USE OF LOUD SPEAKER

Gentlemen:

I am in receipt of your letter which reads as follows:

> "Jehovah's Witnesses have requested permission to use Mission Park on Sunday afternoons, November 14, 21, and 28, from 2:30 to 5:30 p.m., for open air bible lectures and have further requested permission to use a public address system in connection with said services.
>
> "The Commission, at its regular meeting held October 27 granted permission to Jehovah's Witnesses to use Mission Park for the services on the above stated dates.
>
> "The Commission has directed me to request from you an opinion as to whether or not the Commission has the legal right to deny the use of public address systems in public parks."

O P I N I O N

In my opinion to you under date of April 30, 1948 in which I quote from my opinion also to you under date of December 7, 1943, I refer at length to the opinion of the Supreme Court of the United States in

Hague v. Committee for Industrial organization,
(83 L. Ed. 1423),

and from

Hannan v. City of Haverhill,
(120 Fed. (2d) 87

on this subject, and I advised that no authority has been found which would permit a municipality to forbid meetings in certain parks on the grounds that other parks are available for the meetings. The right to hold meetings in parks arises from the fact that parks are public places and a proper place for the exercise of the fundamental rights guaranteed by the Fourteenth Amendment. In April 30 of 1948, dealing with a similar subject, I requoted the language of the Supreme Court of the United States used in the Hague case, which was as follows:

> "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

In answering your request contained in the above letter, I can only elaborate on what I have said in my former opinions. When you permit the parks to be used for purposes other than ordinary park purposes such use must be limited so that the same will not interfere with the ordinary use for park purposes. I have read your letter above quoted with a great deal of interest and, if the Board of Park Commissioners have concluded, or should conclude, that the Mission Park can be used by Jehovah's Witnesses on the dates mentioned without undue interference with the use of the park for park purposes, I am of the opinion that you should permit the use.

The fact that sound amplifiers are being used, I think is beside the question for the reason that on June 7th of the present year the Supreme Court of the United States upheld the use of sound amplifiers in a similar case. In the case cited, for some weeks Jehovah's Witnesses, which I understand is your applicant, had permission to use a sound amplifier in a public park in the State of New York and when the permit expired, the applicant applied for another one but was refused on the grounds that complaints had been made. The applicant nevertheless used his equipment as he had on previous occasions but without any permit from the Chief of Police as was required by the local ordinance. He was convicted of violating the local ordinance and it was admitted that he used the amplifying equipment for speeches in the park and that they were on religious subjects. Some witnesses testified that they were annoyed by the sound although not by the extent of the addresses; others were not disturbed by either.

The Court upheld the local ordinance against the contention that it violated the applicant's right of freedom of speech, assembly and/or worship under the Federal Constitution. Fines and penal sentences were imposed. The conviction of the appellant was affirmed by the County Court and by the New York Court of Appeals and the case eventually found its way into the Supreme Court of the United States. The case in point is <u>Saia v. New York</u> decided by

the Supreme Court as I have heretofore stated on June 7, 1948. In this case, the Court held that it was perfectly proper to use a loud speaker or amplifier in any speech or address and that where no particular regulations were set up in the ordinance, the refusing or granting of the permit to use the amplifiers could not be regulated by the mere discretion of the Chief of Police.

The Court went on to point out that the times at which the amplifier might be used and the number of decibells which the amplifier might use were subject to regulation but that the use of the amplifier could not be prohibited by the mere whim of the enforcing officer.

All the cases are based upon the constitutional provision of the free practice of religion and free speech but they all have agreed on the one point that neither free speech, nor the free practice of religion can be left to the whim of any particular official. There are certain well-defined regulations under which each right may be carried on but they cannot be absolutely prohibited.

Therefore, I am of the opinion that if your Commission should come to the conclusion that Mission Park on the dates that you have mentioned, or any other dates, can be given over to Jehovah's Witnesses without unduly interfering with the use of the property for park purposes, you are justified in permitting the applicant to use the park for the purposes stated in your letter and to make use of a sound amplifier, or any other similar devices for the purpose of broadcasting what is being said.

You are therefore advised that if the use of the park by Jehovah's Witnesses for the purpose mentioned in your letter does not unduly interfere with the use of the park by the public for the purposes for which it was dedicated, you are justified in permitting this organization to use the park, and also a loud speaker, if necessary.

In view of the Hague and Saia cases above cited, it is my opinion that the Park Commission should consider the adoption of one or more rules on this subject in conformity with the principles set forth in these cases. I will be pleased to review any proposed rules at any time you may desire me to do so.

Respectfully submitted,

CITY ATTORNEY

To: Park Commission
CC: Chief of Police

4201

November 5, 1948

SUBJECT: SECTION 43 OF POLICE CODE OF THE CITY AND COUNTY OF SAN FRANCISCO, INSOFAR AS SAID SECTION GRANTS UNCONTROLLED DISCRETION TO THE CHIEF OF POLICE FOR ISSUANCE AND REVOCATION OF PERMITS FOR OUTDOOR USE OF AMPLIFIERS, LOUD SPEAKERS AND SOUND TRUCKS, IS UNCONSTITUTIONAL; SOME PARTS ARE CONSTITUTIONAL.

Gentlemen:

We have your request for an opinion as follows:

"On June 23, 1948, at the direction of the Police Committee, a communication from the American Civil Liberties Union of Northern California, was transmitted to you, relating to Sections 42 to 46 of the Police Code, regulating the use of amplifiers, loud speakers and sound trucks in the City and County of San Francisco.

"Request was made that in view of the contention of the American Civil Liberties Union that the sections above referred to, were unconstitutional because of a recent decision handed down by the Supreme Court in the case of Samuel Saia vs People of the State of New York, that your office render a written decision regarding the constitutionality of Sections 42 to 46 of the Police Code.

"To date this office has not received a reply and we again request that such a written opinion be forthcoming at an early date."

OPINION

Sections 42 to 46 of the Police Code of the City and County of San Francisco regulate the use of amplifiers and loud speakers heard out of doors and amplifiers and loud speakers on vehicles.

Section 42 provides as follows:

"Amplifiers and Loud Speakers Prohibited. It shall be unlawful for any person to maintain, operate, connect, or suffer or permit to be maintained, operated or connected any loud speaker or sound amplifier in such a manner as to cause any sound to be projected outside of any building or out of doors in any part of

the City and County of San Francisco, without first procuring from the Chief of Police of said city and county a permit authorizing the same."

Section 43 provides as follows:

"Permits for Outside Buildings. The said Chief of Police may issue a permit to any person applying therefor, for the use of a loud speaker or sound amplifier to project sound outside of any building or out of doors in any part of said city and county, in the following cases only: (1) the making of charitable appeals; (2) during, and as part of public events; (3) in publishing affairs of interest to the general public, provided, however, that no permit shall be issued for the use of such loud speakers or sound amplifiers in commercial advertising except when issued under subdivisions 4 or 5 hereof; (4) where the announcement or broadcasting is in connection with public events, such as ceremonials, games or amusements, and where the announcement or broadcasting is made for information or amusement of the persons assembled at such ceremonials, games or amusements; (5) for the use of loud speakers or sound amplifiers upon vehicles under the conditions and restrictions set forth in Section 46 of this Article. The permit as issued by the said Chief of Police shall state the name and address of the permittee, the authorized purpose, and the time and place of using such loud speaker or sound amplifier. Any permit issued hereunder is revocable at the pleasure of said Chief of Police."

Section 46 regulates and restricts the use of loud speakers and amplifiers on vehicles as to times, place, and mode of operation and provides for testing and inspection fees.

On June 7, 1948, the Supreme Court of the United States invalidated Section 2 of an ordinance of the City of Lockport, New York, under which a member of the so-called religious sect, Jehovah's Witnesses, had been convicted for using a sound truck in a public park, without a permit from the Chiefo of Police, which permit was required by the ordinance. Saia v. People _____, 68 Sup. Ct. 1148, 92 L. Ed. (Advance Opinion) 1087. The Court of Appeals of New York had affirmed the conviction of violation of the ordinance. 297 NY 659, 76 N.E. (2nd) 323 (1947).

Sections 2 and 3 of the Lockport ordinance provided as follows:

"Section 2. Radio devices, etc. It shall be unlawful for any person to maintain and operate in any building, or on any premises or on any automobile, motor truck or other motor vehicle. any radio device, mechanical device, or loud speaker or any device of any kind whereby the sound therefrom is cast directly upon the streets and public places and where such device is maintained for advertising purposes or for the purpose of attracting the attention of the passing public, or which is so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of travelers upon any street or public places or of persons in neighboring premises."

"Section 3. Exception. Public dissemination, through radio, loud-speakers, of items of news and matters of public concern and athletic activities shall not be deemed a violation of this section provided that the same be done under permission obtained from the Chief of Police."

The Supreme Court of the United States divided 5 to 4 in reversing the conviction. Mr. Justice Douglas in his opinion for the majority 5 justices said in part:

"We hold that §3 of this ordinance is unconstitutional on its face, for it establishes a previous restraint on the right of free speech in violation of the First Amendment which is protected by the Fourteenth Amendment against State action. To use a loud-speaker or amplifier one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion. The statute is not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted. The ordinance therefore has all vices of the ones which we struck down in Cantwell v. Connecticut, 310 U.S. 296, 84 L. ed. 1213, 60 S. Ct. 900, 128 ALR 1352; Lovell v. Griffin, 303 US 444, 82 L. ed. 949, 58 S. Ct. 666, and Hague v. Committee for Industrial Organization, 307 US 496, 83 L. ed. 1423, 59 S. Ct. 954."

The Douglas opinion then stated that in the first case above cited "a license" was required from a public official before religious literature could be distributed, and in the second, before literature could be distributed, and in the third, before a public assembly could be held, so that "previous restraint" on freedom of religion, speech and assembly existed. The opinion then stated:

"The present ordinance has the same defects. The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine. Unless we are to retreat from the firm positions we have taken in the past, we must give freedom of speech in this case the same preferred treatment that we gave freedom of religion in the Cantwell case, freedom of the press in the Griffin case, and freedom of speech and assembly in the Hague case."

The opinion then states in part:

"Loud speakers are today indispensible instruments of effective public speech."

It appears from the provisions of Section 43 of the Police Code that the issuance of a permit is, in the words of the decision, placed in the "uncontrolled discretion of the Chief of Police." The section leaves the question of what constitutes "matters of interest to the general public" for the determination of the Chief of Police. Section 43 also provides that the permit is revocable at the pleasure of the Chief of Police. Section 43, therefore, insofar as the provisions thereof grant uncontrolled discretion in the Chief of Police as to persons who will be granted permits, is unconstitutional under the decision of the Saia case.

Section 43, however, contains a provision that the Chief of Police may limit and restrict the use of loud speakers and amplifiers in commercial advertising. This portion of the section is not affected by the decision in the Saia case and does not violate the Constitution. The Saia case does not overrule the decision in the case of Valentine v. Christiansen, 316 US 52, 62 S.Ct. 920, 86 L. ed. 1262, wherein the Supreme Court of the United States upheld an absolute prohibition of commercial advertisements on city streets. The court upheld an ordinance prohibiting commercial handbills on the public streets as a valid exercise of police power and declared that it did not interfere with the freedom of speech and press guaranteed by the Federal Constitution, since prohibitions and restrictions upon commercial advertising do not violate constitutional guarantees. The same principle applies in this case. Section 43 of the Police Code insofar as it regulates and restricts loud speakers and amplifiers for purely commercial purposes is a valid exercise of the police power.

Section 46 of the Police Code contains provisions for the regulation of sound equipment on vehicles as to times, places and

mode of operation. The Saia case does not hold that such type of regulation is invalid. The decision indicates rather that this type of regulation is valid. Justice Douglas in his opinion states in part as follows:

> "The present ordinance would be a dangerous weapon if it were allowed to get a hold on our public life. Noise can be regulated by regulating decibels. The hours and place of public discussion can be controlled. But to allow the police to bar the use of loud-speakers because their use can be abused is like barring radio receivers because they too make a noise. The police need not be given the power to deny a man the use of his radio in order to protect a neighbor against sleepless nights. The same is true here.
>
> "Any abuses which loud-speakers create can be controlled by narrowly drawn statutes."

See also: portion of opinion first quoted.

The test applied by the courts in similar cases is whether regulations enacted under the admitted police power, as to prevent nuisances and to prevent traffic congestion, etc., are reasonably designed to accomplish the end in view, or whether such regulations amount to attempts, hidden or overt, to circumvent constitutional guarantees. So that, except insofar as Section 46 is governed by the provisions of Section 43 wherein the Chief of Police is given uncontrolled discretion whether or not to issue permits for non-commercial purposes, Section 46 appears to be a valid form of regulation in the case of loud speakers and amplifiers on vehicles.

The Supreme Court of the United States has granted a review of a case upholding a Trenton, New Jersey, ordinance prohibiting the use of all sound trucks upon that city's streets which emit loud and raucous noises. Covacks v. Cooper, 135 N.J.L. 334, 52 Atl. 2d. 806. This case is pending for the Fall 1948 term of the Court. A further expression by the Court on the validity of "narrowly drawn regulations" involving sound trucks upon the streets of a city may be expected from the Court.

Section 42 of the Police Code is not unconstitutional on its face. The word "permit" used therein is inappropriate in view of this opinion as to the unconstitutionality of portions of Section 43. However, since no censorship of ideas" or "previous restraint" is possible under the Section provided that the Chief of Police has no discretion in the matter of issuing a "permit", the requirement of the Section, which would then amount to a requirement for notification to the Chief of Police by the intended user appears to be a reasonable requirement and does

not violate constitutional provisions.

It is my opinion, therefore, under the decision of the Supreme Court of the United States in Saia v. The People, that (1) Section 43 of the Police Code insofar as uncontrolled discretion is granted to the Chief of Police to issue and revoke permits for amplifiers and sound equipment heard out-of-doors for non-commercial purposes is unconstitutional as a violation of the Constitutional guarantee of freedom of speech; and (2) Section 43 of the Police Code insofar as it regulates and restricts the use of amplifiers and sound equipment for purely commercial purposes is a valid enactment; and (3) that Section 42 of the Police Code, if its operation is limited as set forth in this opinion, is not an unconstitutional enactment; and (4) Section 46 regulating the use of sound trucks as to times, places, mode of operation and requiring payment of certain fees, is a valid enactment.

Respectfully submitted,

JOHN J. O'TOOLE

City Attorney

To: Board of Supervisors
Attn: Mr. McGrath

TMO'C

cc to The Mayor

4202

November 10, 1948

SUBJECT: PAYMENT OF COMPENSATION TO COMMISSIONERS FOR ATTENDING MEETINGS

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as to whether members of the City Planning Commission who attend a regularly called meeting, but at which no business can be transacted because of the lack of a quorum and which meeting is therefore adjourned, can collect their per diem for their attendance at such meeting.

O P I N I O N

This identical question has heretofore been presented to me by the City Planning Commission, and answered in my opinion to your department bearing date of February 5, 1945.

I reaffirm the views there expressed as follows:

> "Meetings of the Planning Commission can only be had when a quorum is present; as is provided by section 19 of the Charter, when less than a quorum is present the attending members cannot transact any of the Commission's business, but can only 'adjourn from time to time' until a quorum is present to transact the business at hand.
>
> "Under section 115 of the Charter it is provided that 'the compensation of members of said commission shall be $10 for each meeting of the commission actually attended.' Obviously the 'meeting' therein referred to was a meeting of the commission where a quorum was present, and where it was possible for the commission actually to meet and transact the business of the department.
>
> "You are therefore advised that the commissioners can only be paid for attending meetings of the commission where a quorum of the members thereof are present to transact the business at hand."

Respectfully submitted,

CITY ATTORNEY

To: City Planning Commission
JJO'T

4203

November 10, 1948

SUBJECT: VOLUNTARY ELECTION TO REMAIN UNDER 165 OF THE CHARTER (AS ALLOWED UNDER PROVISIONS OF SECTION 165.2 OF THE CHARTER) CANNOT HERE BE SET ASIDE.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

> "The Retirement Board has directed that the pertinent facts in the case of Louise O. Zirkle, Teacher, an employee of the Board of Education, who retired under voluntary service on July 1, 1948, be recited to you and that your opinion be requested on a certain question arising in the case.
>
> "The following facts, therefore, are submitted:
>
> "1 - Louise O. Zirkle was appointed as a certificated teacher in the Hearst School, City and County of San Francisco, on August 18, 1924, and as such, became a member of the San Francisco City and County Employees' Retirement System under Section 165 of the Charter.
>
> "2 - On July 1, 1947, Section 165.2 of the Charter became effective, and which reads in part '*** Miscellaneous officers and employees of the said departments who are members of the retirement system under Section 165 of the Charter on said effective date, however, shall have the option to be exercised in writing on a form furnished by the retirement system and to be filed at the office of said system not later than ninety days after the effective date hereof, of being members of the system under Section 165 instead of this section, the election under said option to be effective on said effective date.***'
>
> "3 - On September 23, 1947, Louise O. Zirkle came into the office of the Retirement System at 460 McAllister Street, and filed on a form furnished by the Retirement Board, her election to remain under Section 165 of the Charter. Said date of filing was prior to the expiration of the ninety day period after the effective date of Section 165.2, said expiration date being September 29, 1947.

"4 - Upon May 24, 1948, Louise O. Zirkle filed an application for voluntary service retirement with the Retirement Board, said retirement to be made effective July 1, 1948.

"5 - In the first paragraph of Section 165.2 of the Charter, the following appears:

> "'On and after said date, the persons who affirmatively exercise said option, shall continue to be members of the system under Section 165, and shall not be subject to any of the provisions of this section.'

"Therefore, Louise O. Zirkle was retired for voluntary service effective July 1, 1948, under Section 165 of the Charter.

"6 - Subsequent to the receipt of the first retirement allowance warrant on Thursday, September 2, 1948, Louise O. Zirkle contacted the Retirement Office and stated that she had signed the option to remain under Section 165 of the Charter under a misunderstanding and lack of knowledge of the provisions of Section 165.2, and as a result alleges a miscarriage of justice has resulted, and is appealing to the Retirement Board for the opportunity of canceling her election to continue as a member under Section 165.

"The question has arisen in the Board's consideration of the request made by Louise O. Zirkle, as to whether or not it can legally set aside Louise O. Zirkle's option to continue as a member under Section 165 of the Charter, under the above cited circumstances."

O P I N I O N

Section 165.2 of the Charter, which became effective on July 1, 1947, provides in part as follows:

> "Miscellaneous officers and employees of the said departments who are members of the retirement system under Section 165 of the Charter on said effective date, however, shall have the option to be exercised in writing on a form furnished by the retirement

> system not later than ninety days after the effective date hereof, of being members of the system under Section 165 instead of this section, the election under said option to be effective on said effective date . . . On and after said date, the persons who affirmatively exercise said option, shall continue to be members of the system under Section 165 and shall not be subject to any of the provisions of this section."

This language is clear and unambiguous. It blankets all such miscellaneous employees under the provisions of Section 165.2 of the Charter, unless they elect in writing within ninety days after July 1, 1947, filed with the Retirement Board, to remain members under Section 165 of the Charter.

Here, Louise O. Zirkle on September 23, 1947 filed her election, with the Retirement Board, to remain a member under Section 165 of the Charter. Subsequent to Louise O. Zirkle's voluntary retirement, and before cashing her first retirement allowance warrant, she (on or about September 2, 1948) sought to have her election to remain under Section 165 of the Charter cancelled, saying that she misunderstood the election she made.

No sufficient ground or basis appears from the inquiry forwarded upon which the Retirement Board could legally justify setting aside Louise O. Zirkle's voluntary election to remain a member under Section 165 of the Retirement System.

Respectfully submitted,

CITY ATTORNEY

To: Retirement Board
NSW

4204

November 12, 1948

SUBJECT: FARMERS' MARKET; OLIVES AS FRESH OR DRIED FRUIT.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "The Farmers' Market has received an application from a grower to sell farm processed olives in the market. Will you please advise as to whether the management may under the ordinance allow olives to be sold in the market.
>
> "The particular grower described the processing of the olives briefly as follows:
>
> "Spanish Olives - In this case olives are given a lye bath, put through a lactic acid fermentation process and preserved in a heavy brine. The whole process taking from six to ten months.
>
> "Greek Olives - In this case ripe olives are dried in dry salt, boiled in water three minutes, redried without salt and given a bath of olive oil. The process requires about six weeks.
>
> "Green Ripes - Almost ripe olives are given a lye bath, leached and preserved in salt brine. The process includes repeated immersions taking about 30 days.
>
> "Ripe Olives - Fully ripe olives are bathed in lye solution 12 hours and placed on drying trays for 3 days, that process being repeated twice before the olives are washed and put into brine for preservation.
>
> "Inasmuch as the Farmers' Market Ordinance permits the sale of fresh and dried fruits, this office is in a quandry as to whether olives processed as above outlined may be sold in the market by the grower-processor.
>
> "It will be appreciated if we may have your opinion at an early date inasmuch as the grower who has made application would like to market his product before Thanksgiving."

O P I N I O N

Section 1 of the Farmers Market Ordinance, as amended, (Bill No. 4966, Ordinance No. 4719) provides for the sale at the Farmers Market of "surplus or distressed fresh fruits, vegetables, dried fruits, honey and nuts. . ." (Emphasis added)

"Olives" are the fruit of the olive tree. (U.S. v. 52 1 gallon cans (D.C., D. Conn.) 16 Fed. Supp. 385, 387.)

Two types of fruit are permitted to be sold at the Farmers Market; they are "fresh fruits" and "dried fruits".

A review of the particular types of processed olives described in the request indicates that the "Greek Olives" which are dried in dry salt, boiled in water three minutes, redried without salt and given a bath of olive oil would be "dried fruit" and therefore may be sold at the Farmers Market.

The other types of processed olives would not be "dried fruit" and therefore it is necessary to determine whether they may be considered as "fresh fruit". The word "fresh" as used in connection with meats has been distinguished from "cured" meats the latter having been treated with salt, smoke, etc., in order to be kept edible indefinitely. (See Commonwealth v. Clarke, (Pa.) 25 A. (2) 143)

Olives which have been immersed in salt and water simply for the purpose of preserving them from decay in shipment and which have not been subjected to a preparation to make them fit for eating were held not to be "olives prepared" within the tariff laws. (See U.S. v. Zucca & Co., 175 Fed., 578) This case is interesting in that in discussing certain affidavits in the case the court stated at page 580:

> "They /the affidavits/simply show that the olives grown in California, when permitted to ripen are so extremely bitter that they cannot be eaten, and an elaborate preparation is necessary to make them edible." (Emphasis added)

I am of the opinion that the Spanish Olives, the Green Ripe Olives and the Ripe Olives, processed as set forth in your

request are olives which have been subjected to such preparation and processing in order to be made edible that they must be considered as a "prepared" or "processed" fruit rather than a "fresh fruit" and therefore may not be sold at the Farmers Market.

Respectfully submitted,

CITY ATTORNEY

To: Chief Administrative Officer
LSW

4205

November 12, 1948

SUBJECT: RIGHT OF HEIRS OF DECEASED MEMBERS OF POLICE DEPARTMENT TO PAYMENTS FOR ACCUMULATED OVERTIME CREDITED TO MEMBER AT TIME OF DEATH.

Gentlemen:

I have your request for an opinion as follows:

REQUEST

"Under section 35.5½ of the Charter of the City and County of San Francisco and the various subdivisions of said section, the Police Commission may authorize the Chief of Police to require the members of the Police Department to work in excess of the basic week of service during any one week.

"It has been the policy of the Police Commission to allow the members who perform this extra service the option of compensation or equivalent time off at a later date. For those members who elect to take the time off at a later date, the time worked is accredited to their accumulated overtime.

"Since the beginning of the present calendar year, nine active members of the department have died. All of these members had extra time accredited to them for services performed under the provisions of the various subdivisions of Section 35.5½ of the Charter. It is the belief of this Commission that the heirs of these members should be paid the amount of the overtime accredited to them at the hourly compensation rate in effect at the time of death.

"This matter has been discussed informally with members of the Civil Service Department and the Controller's Office, and we have been informed that it has been the policy not to reimburse anyone for such extra duty performed after the individual who earned same has died.

"We would appreciate a ruling from you on this matter as explained above."

OPINION

The applicable provisions of the Charter are as follows:

"SECTION 35.5½ (d) Whenever in the judgment of the police commission public interest requires the services of any member to serve in excess of the basic week of service during any week, the said police commission may authorize the chief of police to permit said service, and said member shall be compensated therefor or shall receive equivalent time credited to him in lieu thereof in accordance with this subsection.

"For service performed in excess of the basic week, members shall be compensated on the basis of straight time in accordance with the ratio which said excess service bears to the basic week of service and the annual compensation provided therefor in section 35.5, or in lieu thereof equivalent time off duty with pay.

* * * * * * * * * * * * * * * *

"The police commission is hereby authorized to require a member or members to work more than forty-four (44) hours per week in any week when public necessity requires such services, and the member or members so serving more than forty-four (44) hours shall be granted added compensation or time off with pay for said extra service performed."

It is to be noted that under the wording of the foregoing provisions the member shall be compensated for duly authorized extra time worked or in lieu thereof shall be granted equivalent time off duty with pay. The mandatory wording of Section 35.5½ thus creates a unilateral obligation on the part of the City and County to pay money to the member for properly authorized overtime worked without further consideration on the part of the member, and it may be paid as extra compensation at the time the overtime is worked, or as continuing salary while the employee is absent from duty. Until the obligation is discharged in either one of the foregoing manners the liability to compensate for the overtime work continues, and this liability may be enforced in an action by the employee upon his separation from service without having taken the equivalent time off. (See: Clark v. Personnel Board, 56 Cal. App. 2d 499; Howard v. Lampton, 87 A.C.A. 529.) Upon the member's death without having been granted the equivalent time off with pay, this right of action inures to the benefit of his personal representative. (Sec. 573, Code of Civil Procedure.)

You are therefore advised that it is my opinion that the heirs or personal representatives of the deceased member having properly authorized accumulated overtime to his credit at the time of death should be paid the cash equivalent of such overtime upon a proper showing of their right to succeed thereto.

Very truly yours,

TJB

JOHN J. O'TOOLE, City Attorney.

November 23, 1948

SUBJECT: REJECTION OF LOW BID FOR WAWONA CLUBHOUSE.

Dear Sirs:

I have your letter under date of November 16, 1948, wherein you submit to me a bid presented by Alfred P. Fisher, offering to perform the construction work on the Wawona Clubhouse and certain incidentals thereto for the Recreation Commission at a price of $108,785.00, subject to certain deductions being made in the event that the work is curtailed. Your proposals to do the work provide that "all offers must be made on the proposal form bound with the specifications". Mr. Fisher did not follow this particular specification, but typed out on his own letterhead his offer in regard to the construction. While the offer was not on the specifications furnished by the City, I am advised that it practically complies with them. True, there is contained in the specifications that no alterations or erasures shall be permitted, and in looking over Mr. Fisher's bid, I find the following crossed out in the next to the last paragraph: "certified check in the amount of _____". In lieu of the certified check, Mr. Fisher furnished you a bid bond in the sum of $15,000.00, which would seem to comply with the present Ordinance.

In other words, Mr. Fisher has practically complied with your proposals with the exception that instead of using your bid form, he placed his bid on his own stationery. I further understand that at the time of closing of the reception for bids Mr. Fisher did not have his bid inclosed in an envelope, but that he did have an envelope properly endorsed and offered to inclose the bid in it, but was advised by whoever was in charge of receiving the bids that this was not necessary.

O P I N I O N

It is not every bid that does not exactly comply with specifications that can be rejected for non-compliance. As far back as April 4, 1933, I had occasion to advise the Board of Public Works that unless the departure from the proposal had some direct effect on the bid it is not proper to reject it on the ground of non-compliance, and I cited the case of Faist v. The Mayor of the City of Hoboken, 60 Atl. 1120, where the court said:

> "Mere irregularity of a bid will not justify its rejection by a municipal body charged with a duty of awarding a contract to the lowest bidder. The form of the bid, not being embodied in the statute, is a regulation prescribed by the City; and failure to technically comply with

> the form required will not defeat the right of the lowest bidder, to have the contract, if, after the bids are opened, it appears there has been a substantial compliance with the requirements, and he tenders himself ready to execute the requisite contract and furnish responsible bondsmen or good security, as was the fact in this case."

With this language in mind, I cannot see that Mr. Fisher's departure from specifications was so serious as toauthorize the rejection of his bid and the acceptance of the bid next in line. It seems to me that the objections made to Mr. Fisher's bid are in themselves rather trivial and the courts would not sustain rejection on the grounds which you have indicated.

However, I further understand that the bids have far exceeded your estimated cost of this particular improvement. If such is the case, you are justified in rejecting all bids, and, if you deem it advisable, to change your specifications in such manner as you deem will be for the best interest of the department. This you are authorized to do.

I understand that you have already awarded the contract to the bidder next in line after Mr. Fisher. If such is the case, you should set aside any award so made and advise all bidders that all bids are rejected and that your specifications will be revised and that you will advertise for new bids.

I am herewith returning you your specifications and your correspondence with Mr. Fisher.

Respectfully submitted,

CITY ATTORNEY.

To: Recreation Department

JJO'T

4207

November 29, 1948

SUBJECT: QUESTION OF RESIDENCE OF WILLIAM D. KILDUFF RE APPOINTMENT TO CITY PLANNING COMMISSION.

Dear Sirs:

This will acknowledge receipt of your request for an opinion as to the residential qualifications of William D. Kilduff for appointment to the position of City Planning Commissioner.

You submit the following affidavit of Mr. Kilduff:

> "My father was an officer of the United States Navy, and during my youth we lived at military reservations both inside and outside of the United States. I reached my majority while an undergraduate at Princeton University.
>
> "I graduated from Princeton University on June 14, 1941 and reported for active duty as an officer in the United States Army on July 1, 1941, at Carlisle, Pennsylvania.
>
> "I came to San Francisco on July 5, 1943, and remained here until I reported for duty at Fort Ord, California, on July 10, 1943. While in San Francisco, I admired the beauty of the City and the friendliness of its people and intended that this would be the place where I would reside.
>
> "I was released to inactive status from the United States Army on December 17, 1945, and came immediately to San Francisco where I obtained employment, married, and made my home.
>
> "I have never voted anywhere but in San Francisco.
>
> "Since July, 1943, I intended to reside in San Francisco, and I have considered myself a resident of San Francisco, and have never intended nor intend to reside elsewhere."

O P I N I O N

The information received would indicate that the question arises whether Mr. Kilduff could become a resident while living in San Francisco and being on active duty with the United States Army and intending that San Francisco should be his place of residence.

Section 243 of the Government Code sets forth as follows:

> "Residence: Existence. Every person has, in law, a residence."

Section 244 of the Government Code sets forth the rules to be observed in determining the place of residence. The ones pertinent to the instant inquiry are:

> "(a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose.
>
> "(b) There can only be one residence.
>
> "(c) A residence can not be lost until another is gained.
>
> "(d) The residence of the father during his life, and after his death the residence of the mother, while she remains unmarried, is the residence of the unmarried minor child.
>
> "(g) The residence can be changed only by the union of act and intent."

Thus, we see that Mr. Kilduff became free to choose his own place of residence upon reaching his twenty-first birthdate, which event occurred while he was a student at Princeton University. Immediately upon his graduation, he entered the services of the United States Army and eventually came to San Francisco whereupon he states that he formulated the intent to make it his permanent residence.

> "The matter of residence is essentially one of intention." Joe Lowe Corp., v. Rasmusson, 53 Cal. App. (2) 490.

Does the fact that Mr. Kilduff was in the services of the United States Army when he was in San Francisco prevent him from formulating the intent to make it his legal residence?

The Court in the case of Berger v. Superior Court, 79 Cal. App. (2) 425 at 429, in discussing the residence of persons in military service states:

> "If therefore, petitioner desired to change his legal residence to California after he was stationed in California there was nothing to prevent him from doing so. He was living in California and all that was required to make him a legal resident was a decision or intention on his part to become a resident of California."

The Appellate Court in the Berger case cites Percy v. Percy, 188 Cal. 765, which holds:

> "The fact that at the time in question he was on military duty in an army camp did not preclude him from establishing his residence there if he so desired." (Citing cases)

In the case of Johnston v. Benton, 73 Cal. App. 565, in discussing the intention of an officer stationed at the Presidio of San Francisco as to the county of his residence, the court stated:

> "Whenever the question of intention of a person is at issue, it may be proved by direct testimony of such person . . . . ." (Citing cases)

You are therefore advised that if from all the facts you find that Mr. Kilduff in July, 1943, did intend to permanently make his residence in San Francisco, there was such a union of act and intent, which would make him a resident as of that date. If he has never since changed his intention of residency, he then remained a resident of San Francisco from that period of time.

If it is your determination that he was a resident of San Francisco, the fact that he subsequently served two years duty with the United States Army before his return to San Francisco would not disqualify Mr. Kilduff for appointment as a Commissioner on the City Planning Commission under Section 7 of the Charter, as such performance of duties is not within the contemplation of that Section.

Respectfully submitted,

CITY ATTORNEY.

JGMcB

To: Office of the Mayor.

4208

November 29, 1948

SUBJECT: CALF CARCASSES, FEES ON INSPECTION BY HEALTH DEPARTMENT.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "Hahn & Co., 550 Seventh Street, and the Golden West Calf Co., 712 Tehama Street, receive calf carcasses from outside the city in accordance with Sec. 536(b) of the Municipal Health Code. Until recently they have paid fees to cover costs of inspection in accordance with Sec. 538(a) of said code.
>
> "Recently the inspection fees incorporated in said Sec. 538(a) were increased and the two firms have refused to continue payment of fees, contending they are not liable for such fee payments.
>
> "Will you please advise as to whether the firms mentioned are required to pay fees as set forth in Sec. 538(a) of the Health Code."

Investigation has revealed that the calves in question are killed outside of San Francisco and the carcasses are brought to the firms mentioned in your request where t ey are inspected and thereafter delivered to other persons without being dressed or made ready for market at the firms mentioned in the request.

O P I N I O N

The inspection of calf carcasses brought into the City and County of San Francisco is required by Section 536(b) of the Health Code of the San Francisco Municipal Code which provides in part as follows:

> " . . . each of said carcasses of such calves must be inspected and stamped and marked by the Department at the point of arrival of said carcasses of such calves in the City and County of San Francisco, or at their first place of rest."

Section 538 of the Health Code of the San Francisco Municipal Code entitled Fees and Charges provides in part as follows:

> "For the purpose of meeting and providing for the cost of the inspection and examination provided for in this Article, the following fees shall be paid to the Tax Collector of the City and County:
>
> "(a) All persons, firms and corporations <u>killing, dressing and making ready for market in the City and County of San Francisco</u> any of the animals mentioned in Section 536 of this Article shall pay the sum of THREE (3¢) CENTS per each one hundred (100) pounds of the meat of said animals as weighed after said animals have been killed and dressed; provided, that the minimum monthly sum paid shall be not less than FORTY ($40.00) dollars." (Emphasis added)

The above section provides that "persons, firms and corporations killing, dressing <u>and</u> making ready for market . . . any of the animals mentioned in Section 536" must pay the fee to help defray the cost of inspection. It is my opinion that in order to collect the fee, it is not necessary that the killing, dressing <u>and</u> making ready for market of the animals <u>all</u> be done in the City and County of San Francisco but that if <u>any one</u> of such acts is performed in the City and County of San Francisco and the animals are required to be inspected, that the person, firm or corporation is then liable for the inspection fee. The purpose of the requiring the inspection fee is to help defray the cost of the required inspection. I feel therefore that the intention of the Board of Supervisors in drafting the provisions of this section require the word "and" to be construed as "or".

See:

> Bianco v. I.A.C.,
> 24 Cal. (2d) 584 at 587

where the court stated:

> "Moreover, the word 'and' may sometimes be interpreted as 'or' to carry out the intention of the Legislature in drafting a statute. (See People v. Pool, 27 Cal.

572; Washburn v. Lyons, 97 Cal. 314, 315 /32 P. 310/; Diggins v. Hartshorne, 108 Cal. 154 /41 P. 283/; McNutt v. City of Los Angeles, 187 Cal. 245 /201 P. 592/; Santos v. Dondero, 11 Cal. App. 2d 720 /54 P. 2d 764/.)"

However, it appears that in the instant case the calves are neither killed, dressed nor made ready for market in the City and County of San Francisco within the meaning of Section 538(a) of the Health Code of the San Francisco Municipal Code and for that reason the firms in question are not required to pay the inspection fees set forth in that section.

Respectfully submitted,

CITY ATTORNEY

To: Chief Administrative Officer
LJM

December 2, 1948

SUBJECT: WATER MAY BE FURNISHED STATE FISH HATCHERY PROJECT.

Dear Sir:

You have asked whether the City may release a quantity of water from the Moccasin Reservoir into a series of ponds to be constructed upon City land by the State Fish and Game Commission and then to be discharged into Moccasin Creek.

O P I N I O N

In the furnishing of twenty cubic feet of water per second for the use by the State in a hatchery to be constructed by them, the obvious thing to guard against is our water rights. It would appear that as these waters furnished for the purpose stated are really foreign waters, we have the right to discontinue the discharge of them at any time and the State or anyone else could not acquire any right to them. The proposed waters come from the head waters of the Tuolumne River and are hence foreign to the Moccasin Creek. It was held in

> E. C. Horst Co. v. New Blue Pt. Min. Co., 177 Cal. 631,
>
> "Foreign waters are those which originate outside the watershed of the stream in which they are found and which reach the stream by artificial means. It is well established that the person who introduces foreign waters into a stream may discontinue their introduction and that riparian and other users below him cannot acquire a right against the creator of the flow, either by appropriation or prescription to the continued augmentation of the natural flow." (Cited in L. Mini Estate Co. v. Walsh, 4 Cal. (2) 254; Stevens v. Oakdale Irr. Dist., 13 Cal. (2) 348.)

In the later case of Stevens v. Oakdale Irrigation District, 13 Cal. (2) 343, the Supreme Court of California in citing the Horst case, supra, stated:

> "Waters brought in from a different watershed and reduced to possession are private property during the period of possession. When possession of the actual water, or corpus, has been relinquished, or lost by discharge without intent to recapture, property in it ceases. This is not the abandonment of a water right, but merely the abandonment of specific portions of water, i.e., the very particles which are discharged or have escaped from control."

The court also in this case in summarizing the rule stated with respect to foreign waters points out that there

> "may be exceptions, as perhaps where the artificial condition has become inherently permanent and there has been a dedication to the public use, or where the drainage is stopped wantonly to harm a lower party, without other object."

Therefore to avoid any claim that may hereafter be made, not only by the State to the waters furnished for the purpose stated, but likewise for the Districts downstream and the riparian owners along the Tuolumne attacking the transaction as an illegal diversion of waters and outside the terms of the Raker Act, a revocable permit should be granted the State for the purposes stated and a stipulation contained therein to the effect that in the event the City should ever require the twenty cubic feet of water, either for domestic purposes or any other purposes stated under the Raker Act, the City should have the right to discontinue the discharge of such waters.

It is understood that these waters after passing through the fish ponds would eventually be recaptured by the Don Pedro Reservoir (where they would be captured anyway at the present time if they passed through the tunnel), and are available to the districts and the riparian owners of the Tuolumne, and thus it is difficult to conceive of any objection on their part when the City merely uses the natural water course of Moccasin Creek to bring the waters to the same present destination.

Respectfully submitted,

CITY ATTORNEY.

To: Manager of Utilities

JGMcB

4210

December 7, 1948

SUBJECT: BUILDING CODE - INTERPRETATION OF. WHETHER BUILDING BEING ALTERED OR REPAIRED MUST BE BROUGHT INTO LINE WITH ALL PROVISIONS OF THE CODE.

Gentlemen:

I have your request for an opinion as follows:

REQUEST

"In connection with the practical application of the new San Francisco Building Code of 1947, a question has arisen in connection with which we would like to obtain your opinion as to the proper interpretation of a certain section of the Code. We would like an opinion specifically on the following question:

"'Where an alteration or addition or repair is to be made to an existing building constructed under the earlier code, to what extent must the building being altered (as distinct from the addition or alteration thereto) be brought into line (by reconstruction) with the requirements of the 1947 code?'

This question to my mind involves an interpretation of Sec. 103. Also, see Sections 2, 102, and 105.

"In a letter dated February 4, 1948, you rendered an opinion in reply to a request by the Board of Permit Appeals on a somewhat similar but more specific requirement in connection with sprinkler systems. In this opinion, which applied particularly to sprinkler systems, you believed that at least for all those buildings which would come under the State Housing Act that law would retroactively affect any entire building to which an alteration or addition was to be made. In this Act it apparently specifically stated that 'all structural rules apply to apartments or hotels being built or altered.'

"However, the State Housing Act applies only to very specific types of structures, particularly apartment houses and hotels, whereas our question would apply to all existing buildings.

"It seems to me that it must be apparent that it would be impracticable, if a building permit were requested rearranging certain partitions in the Old Crocker Building, to force the owner of that structure which was built prior to 1906, into what would be almost a complete reconstruction of it.

"Such a ruling would force the owner to meet such requirements of our present code, as those for lateral (earthquake) forces, extension of sprinkler systems, types and character of lathing and plastering (metal lathing and plastering) smoke towers, number of stairways, etc.

"Your early consideration of this matter would be greatly appreciated since it is a problem which has come before us repeatedly and will continue to do so."

O P I N I O N

You will note that Section 103 of the Building Code provides, in part, as follows:

"Additions, alterations, repairs and change in use or occupancy in all structures shall comply with the provisions for new structures except as otherwise provided in sections 104, 105 and 502 of this Code."

I can find no basis for construing this language to mean that when repair or alteration work is performed on a building that other portions of the building not affected by such repair or alteration must be reconstructed so as to bring the entire building into line with the requirements of the Code. Such a construction is unreasonable and would only serve to thwart rather than effectuate the purpose of the Code as expressed in Section 102. If, for example, a certain amount of repair work is necessary on a building to properly protect the building and the occupants thereof, it is reasonable to expect that in many instances such work would not be performed if the owner had, in addition, to reconstruct his entire building to bring it in line with the provisions of the new code. Further, such a construction would in effect make the law operate retrospectively, and a statute may not be so construed unless the intent to make it so operate clearly appears from the language used. No such intent is manifest in the language quoted.

However, with reference to a change in use of a building, the Code provides in Section 105 that

"no change shall be made in the character of occupancy or use of any building which would put the building

"to a different use unless such building is made to comply with the requirements of this Code for that use . . ."

I take this language to mean exactly what it says, and that if a building is changed from one use to another, then the entire building must be brought in line with the provisions of the code applicable to the changed use.

In your letter you refer to my opinion of February 4, 1948, but you give that opinion a broader interpretation than is warranted by the language used. That opinion is limited to the particular problem presented and merely points out that under the state law and our building code, if a building is altered and an addition made thereto, and as a result a basement or cellar is created having an area greater than 1500 square feet, an automatic sprinkler system must be installed.

In conclusion, you are advised that it is my opinion that Section 103 requires that additions, alterations or repairs to a building must comply with the provisions of the new building code but that it does not require that portions of the building not affected by such work be reconstructed so as to bring the entire building in line with the new code, unless a change is made which would put the building to a different use, in which event the entire building must comply with the requirements of the code for that use.

Very truly yours,

JOHN J. O'TOOLE, City Attorney.

TO: DEPARTMENT OF PUBLIC WORKS
Attention: Mr. H. C. Vensano
VIA: CHIEF ADMINISTRATIVE OFFICER
THOMAS A. BROOKS
City Hall, San Francisco 2

TJB

4211

December 8, 1948

SUBJECT: RESIDENT REQUIREMENTS, ELIGIBLES FOR APPOINTMENT TO CIVIL SERVICE POSITIONS.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

> "We recently announced an examination for appointment to the position of Superintendent, Bureau of Building Inspection, which contained the usual residential requirement, namely, residence in the City and County of San Francisco, and at least one year of such residence prior to the date of the examination.
>
> "Among the eligibles who filed an application and who successfully passed the examination is Mr. Sidney S. Gorman, who on his application stated his present mailing address to be 435 Frederick Street, San Francisco, and gave that same address as his present legal address, and who stated he had been a resident of San Francisco for three years immediately prior to the date of his application. He stated further that he had not been registered to vote nor legally entitled to vote at any place but San Francisco during the last year. For the past six years his present employment has been the San Francisco Naval Shipyard at Hunters Point.
>
> "After adoption of the list of eligibles, on which list Mr. Gorman's name appears in rank No. 1, a protest challenging the residential qualifications of Mr. Gorman was filed with the Civil Service Commission by H. Ward Dawson, Jr., Attorney for the Civil Service Association of San Francisco. In his letter Mr. Dawson states that Mr. Gorman is listed in the San Mateo County telephone directory as residing at 1308 Alvarado Avenue, Burlingame, that Mr. Gorman and his family actually reside there, and that the residence at that address is in Mr. Gorman's name and taxes thereon have been paid in his name. The protestant also states that Mr. Gorman's name is included in various professional directories, such as the American Society of Civil Engineers (year Book 1947), the roster of Civil Engineers and Surveyors, published by the State of California 1947-48, etc., as residing at the Burlingame address. In answer to that point Mr. Gorman refers to the fact that the

San Francisco section of the 1946, 1947, and 1948 editions of the year book list him as residing at 435 Frederick Street, San Francisco, and the 1945 edition at 344 Pacheco Street, San Francisco.

"In support of his San Francisco qualifications Mr. Gorman states that he was born in San Francisco in 1898 and resided in San Francisco continuously until 1941. He further states that in 1941 his wife's physician recommended that she move from San Francisco to Burlingame on account of sinus trouble, from which she had suffered for a number of years. Accordingly, in 1941 Mr. Gorman moved from 778 Faxon Avenue, San Francisco to the Burlingame address noted above, and for the first two or three years rented the premises in Burlingame. He states that when he first moved to Burlingame he registered to vote in San Mateo County, but that a year or two later in about 1943 or 1944 he reestablished his voting residence in San Francisco, using the address 435 Frederick Street, San Francisco as his legal and voting address. He states that ultimately he purchased the property in Burlingame as the former owner placed the property on the market and it was necessary for him to purchase the property if he wanted to remain in it.

"Mr. Gorman states that the residence at 435 Frederick Street is his legal and voting residence and that he lives there part time with a widowed sister and her two sons toward whose support he contributes.

"Mr. Gorman states that he registered in the draft from the Burlingame address and points out that subsequently he reestablished his voting residence in San Francisco.

"We have verified the fact that Mr. Gorman voted in San Francisco from the Frederick Street address in 1946, 1947, and 1948. No check was made of the record of former years. He stated that it is his intention to ultimately return to San Francisco with his family when his wife's health will permit and that he considers San Francisco as his permanent legal and voting address. He has filed a letter with us to that effect. He has also filed with us a letter dated September 24, 1948 signed by Dr. S. V. Christierson, 490 Post Street, San Francisco, reading as follows:

"'Mrs. Sidney Gorman has suffered intermittently

from sinus infections, for which she has been treated by me since 1932.

"'On my advise she moved to Burlingame in 1941, in order to benefit by more favorable climate. She has lived there since that time and has been definitely benefited thereby.'

"You will no doubt recall the Archer case as well as the Dierssen case. After the courts ruled in favor of Archer, the Commission, in determining residential status, has been guided by the following ruling:

"'Registration to vote shall be accepted by the Civil Service Commission in the absence of evidence to the contrary as presumptive or prima facie evidence of residence at the voting address. Evidence of legal residence at an address different from that at which registered to vote must be sufficient to satisfy the Commission beyond all doubt that the individual had at the time of registration or voting a legal residence at a place different from his voting address.'

"Will you kindly advise us in your opinion if the facts as here set forth justify the Commission in ruling that Mr. Gorman is not a resident of San Francisco, and removing his name from the list of eligibles."

O P I N I O N

The problem presented in your request centers itself primarily about the point as to whether, under the facts stated therein, you would be justified in removing the name of Mr. Sidney S. Gorman from the list of eligibles for appointment to the position of Superintendent, Bureau of Building Inspection. The Charter contains the necessary authority for the commission to remove names from lists of eligibles. These sections are Section 145 which reads in part as follows:

> "The commission may remove all names from the list of eligibles after they have remained thereon for more than two years and all names thereon shall be removed at the expiration of four years. The commission may, however, provide in the scope-circular of any examination that the list of eligibles secured thereby shall automatically expire at a date not less than two or more than four years after the adoption of such list."

and Section 147 hich reads in part as follows:

> "Any eligible securing standing on a list by fraud, concealment of fact or violation of commission rules shall be removed from such list and if certified or assigned to a position shall be removed therefrom."

It is obvious that Section 145 has no application to the facts stated in your request and accordingly if the Commission is to act in removing the eligibles named it must do so pursuant to its findings under Section 147.

Section 144 of the Charter deals with the question of who may apply for the right to take examinations for civil service appointments and provides in part as follows:

> "Any citizen having the qualifications prescribed by section 7 of this charter may submit himself for any examination under conditions established b the civil service commission. . . ."

The District Court of Appeal in the case of Dierssen v. Civil Service Commission, 43 Cal. App. (2) 53, had the question of interpretation of Section 144 before it under facts similar to the question presented in your request and unequivocally concluded that the Civil Service Commission "in passing on such questions, including the question of residence. . . acts in a quasi-judicial capacity". This conclusion of the court is based upon reasoning clearly showing that one of the duties of the Civil Service Commission and one of its powers is to pass upon the residence of all applicants for positions in the City's service.

Clearly then from the Charter and the court's decisions, the Commission has the full power to act upon the facts presented. The Commission must be guided by its own rules passed pursuant to the authority contained in the Charter. From the residence rule quoted in your request, Mr. Gorman appears to meet the resident requirements contained therein and accordingly a prima facie showing of residence has been made by him which would be sufficient according to your rule to establish presumptive evidence of such residence.

However, it is obvious from your request that the Commission has additional evidence before it which it might consider as conflicting, concerning the residence of Mr. Gorman, and it is therefore

impossible as a matter of law to advise you directly upon the point in your request.

I advise you that the Commission, possessing the powers of a fact-finding body, must apply to the facts so presented the law as set forth in the Charter, the court decisions and the Civil Service rules, and rule accordingly.

Respectfully submitted,

CITY ATTORNEY

To: Civil Service Commission
EJ

4212

December 9, 1948

SUBJECT: DISCIPLINARY ACTION, FIRE DEPARTMENT, RIGHT OF CHIEF OF DEPARTMENT TO SUSPEND PENDING TRIAL.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "I respectfully request an Opinion, for my guidance, regarding the Disciplinary Procedure, as defined in Section 155, of the Charter of the City and County of San Francisco, on the following points:
>
> "Has the Chief of Department, Assistant Chiefs and Battalion Chiefs the power to suspend a member of the department for infraction of the Rules of the Fire Department before trial.
>
> "Section 155 of the Charter specifically states that members of the Department shall not be subject to dismissal, nor to punishment for any breach of duty or misconduct, except for cause, nor until after a fair and impartial trial before the Board of Fire Commissioners, upon a verified complaint filed with such Commission setting forth specifically the acts complained of, and after such reasonable notice to them as to time and place of hearings as such Commission may, by rule, prescribe. The accused shall be entitled, upon hearing, to appear personally and by counsel; to have a public trial; and to secure and enforce, free of expense, the attendance of all witnesses necessary for his defense.
>
> "Take the case of a member who through intemperance or unlawful acts or through the reckless negligence of his person or health is unable to properly perform the duties of a Fireman - have not the Chiefs the power to suspend him pending trial?
>
> "If a member should resign before trial; or after trial is found not guilty; is he entitled to his compensation during the time of his suspension?
>
> "Your Opinion on the above will be appreciated."

O P I N I O N

The question presented by your request may be summarized as follows: Is the act of a Chief in suspending a member of the Fire Department a dismissal or a punishment of said member?

We may rule out the question of whether this act is a dismissal without any further discussion thus leaving the sole question to be decided, would this act of suspension contravene Section 155 of the Charter of the City and County of San Francisco and constitute a punishment.

In Marsh v. State Bar of California, 2 Cal. (2d) 75, the Supreme Court stated that the discipline of an attorney by suspension from practice is not a punishment and is not punitive in character but is for the protection of courts and the legal profession. Webster International Dictionary defines the word "punishment" as "a pain, suffering or loss inflicted on a person because of a crime or offense."

The United States Supreme Court in the case of Bishop v. United States, 197 U.S. 334, 49 L. Ed. 780, held that the suspension of a naval officer charged with drunkeness and neglect of duty from morning until evening of the same day, when he was restored to duty, to give time to investigate the case, is not such a punishment for the offense as precludes further proceedings against him by court martial but must be deemed simply a temporary precaution for the preservation of good order and discipline. Other authorities likewise indicate that actions of this sort are not punishment as that term is generally understood.

I advise you therefore that the suspensions referred to in your request by a Chief during the pendency of a trial are not punishments as such term is used in Section 155 and therefore do not come within the purview of said section requiring a fair and impartial trial before the Fire Commissioners before they may be carried out, but constitute a temporary precaution for the preservation of good order and discipline.

Since the suspensions referred to above are not punishments as this term is used in Section 155 of the Charter, the question next presented is whether such acts of suspension may be exercised by the chief of department or someone designated as acting chief during his absence. Section 20 of the Charter provides in part as follows:

> "Each elective officer in charge of an administrative office, the chief executive appointed by each board or commission, the controller, the chief administrative officer, and each department head appointed by the chief administrative officer shall have the powers and duties of a department head, except as otherwise specifically provided in this charter.
>
> "Each appointive department head shall be immediately responsible to the chief administrative officer or the board or commission, as the case may be, for the administration of his department, and shall file an annual report and make such other reports, estimates and recommendations at the time and in the manner required by law, or as required by the chief administrative officer, board or commission."

Section 36 provides in part as follows:

> "The fire commission shall appoint a chief of department, a secretary and a department physician who shall hold office at its pleasure."

From these sections, it is quite clear that the chief of department is the executive officer of the fire department and is responsible for the enforcement of the necessary rules and regulations of the department in order that they may be properly administered. This executory power carries with it certain discretion and in the exercise of this discretion the chief of department has the power to suspend a member temporarily for the purposes recited above. However, this suspension, being of a temporary nature, the chief of department must file the necessary verified complaint, referred to in Section 155, against the member of the department concerned at the next regular meeting of the fire commission.

In answer to your second question concerning the compensation of the suspended member of the department, I advise you that Section 150 of the Charter reads in part as follows:

> ". . . . No officer or employee shall be paid for a greater time than that covered by actual service . . ."

I advise you therefore that if the member of the department is suspended in the manner described by your request he may not be compensated for such time of suspension. If, however, after trial by the Fire Commission he is found not guilty and reinstated he would be entitled to his compensation for the period of suspension. If he should resign during the period of his suspension and prior to the decision of the Fire Comission his resignation should be effective as of the date that the suspension began and therefore he would not be entitled to any compensation.

Respectfully submitted,

CITY ATTORNEY

To: Chief of Department,
San Francisco Fire Department

4213

December 14, 1940

SUBJECT: [illegible]; [illegible]; MATERIALS PURCHASED FOR USE IN METROPOLITAN LIFE INSURANCE COMPANY'S PARKMERCED PROJECT.

Dear Sir: I have your request for an opinion as follows:

"We respectfully request that your office render a legal opinion on the subject matter contained in the attached letter from F. J. Gilmartin of the firm of Knight, Boland and Riordan, Counselors at Law who are representing the Metropolitan Insurance Company."

The attached letter reads as follows:

"Metropolitan Life Insurance Company is a New York corporation authorized to do and actually doing business in California. Pursuant to California Law (Chap. 2, Art. 2.5 Insurance Code) and Permit issued by the Insurance Commissioner, the Company in 1940 engaged in the building of a local housing project known as Parkmerced. It is wholly owned and operated by Metropolitan. Because of wartime limitations and restrictions the project was only partially completed and the Company now proposes to complete it. For your information, the Company owns other similar projects in other states and one in Los Angeles known as Parklabrea.

Some materials which will go into the construction of the new buildings will be purchased from manufacturers outside of the State of California. The builder of these projects is the firm of Starrett Bros. & Eken, which has had wide experience in building operations and is organized to conduct efficiently the construction work necessary to effect the completion of the local project. The builder renders all construction services required by the owner and provides all services, labor, equipment and materials necessary to do the work, including street work, grading, paving, landscaping, etc., all in accordance with plans and specifications first approved by the owner. Also, the

builder negotiates all employment and purchases; but no purchase is made without the approval of the owner, except incidental purchases for current conduct of the work. The builder is required to keep accurate books of account showing in such detail as is required by the owner (Metropolitan), the cost incurred in the building operation. All machinery, equipment, tools, and materials of any kind used in the doing of the work are chargeable to the owner and immediately upon acquisition thereof by the builder, title thereto passes to the owner. In other words, title to such goods is in Metropolitan and such goods are insured against damage by fire and other hazards for the benefit of Metropolitan.

"It is part of the job of the builder to negotiate for the purchase of materials but as above indicated, only on the approved order of Metropolitan. The title to goods so ordered immediately passes to Metropolitan although it may be, for practical purposes, billed to the builders. The goods, however, find their way into a particular job, in this case Parkmerced. Payment for these goods may be made by the builder or out of the builder's own funds, in which case he is reimbursed by Metropolitan within thirty days.

"The question arises as to whether such materials purchased outside of California for use in Parkmerced are subject to the City and County of San Francisco Use Tax. In that connection, we call to your attention the provisions of Section 14-4/5 of Article XIII of the Constitution of California which imposes a gross premiums' tax on insurance companies. Subdivision 1 of said section provides as follows:

> 'The tax imposed on insurers by this section is in lieu of all other taxes and licenses, State, County and Municipal, upon such insurers and their property.'

"Section 13263 of the California Revenue and Taxation Code contains the same language as the

Constitution. Because of the above-mentioned constitutional provisions and state laws which, of course, are paramount to local authority, it is our opinion that Metropolitan is not chargeable with any tax under the Use Tax Ordinance.

"To facilitate the making of contracts under the foregoing circumstances, we would be happy to have from you a ruling to the effect that there is no tax liability and we would appreciate your immediate action in this respect."

O P I N I O N

You will recall that on December 8, 1947, I advised you that the Metropolitan Life Insurance Company enjoyed an exemption from our Purchase and Use Tax under Section 14-4/5 of the Constitution and this exemption extended to purchases in connection with the Metropolitan Housing Projects inasmuch as they were investments authorized by the Insurance Commissioner and therefore constituted property used by the company in the course of its insurance operations.

In the attached letter from Mr. Gilmartin it appears that title to the materials purchased passes immediately to the Metropolitan and that it is actually the purchaser and user of the materials. The legal incidence of the tax would therefore fall upon the Metropolitan and the constitutional immunity would apply. (See the cases of United States vs. Allegheny County, 322 U.S. 174 and Mayo vs. United States, 319 U.S. 441.)

You are therefore advised that it is my opinion that under the circumstances outlined in the letter from Mr. Gilmartin there is no tax liability for the materials so purchased for use in the Parkmerced Project.

Respectfully submitted,

CITY ATTORNEY

To: Tax Collector
cc: Chief Administrative Officer

4214

December 15, 1948

SUBJECT: CONTRACT FOR FLUSHING CITY STREETS

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as to the right of the city to contract with the North Central Improvement Association to employ it to flush certain streets in San Francisco, or to pay the Association the $227.00 cost of a license fee imposed by the State of California on the sprinkling truck owned by the Association.

You have enclosed with your request a letter from the North Central Improvement Association on this same subject matter, as well as a proposed agreement as drafted by the Association.

I am advised that the North Central Improvement Association is a non-profit association representing property owners and business interests in the financial district north of Mission Street and east of Grant Avenue. I further understand that this association owns its own sprinkling truck and, at its own expense, has been using this truck for several years past to supplement the street flushing work the city has carried on in this same area. The association is now desirous, if possible, of recovering from the city the $227.00 state license fee it pays for its sprinkling truck.

O P I N I O N

The proposed contract, as submitted by the Improvement Association, undertakes to have the city employ the North Central Improvement Association to flush all the city streets in a certain defined area for an agreed compensation. It should be pointed out that the city is already flushing these same streets - but not daily, as is desired by the Improvement Association representing certain property owners and business interests therein located.

I have heretofore had a somewhat similar problem presented to me from the Controller's Office, and had occasion to advise him on October 3, 1941, that it would be illegal for the city, or any department thereof, to enter into a contract for an independent party or association to render services regular civil service workers are entitled to perform, and which would take from civil service eligibles the right to perform this work. We are not here concerned with urgent, temporary or occasional work requiring expert knowledge, experience or ability, which presents an entirely different situation.

See: San Francisco vs. Boyd, 17 Cal. (2d) 606

Kennedy vs. Ross, 28 Cal. (2d) 569

In the case of Stockburger vs. Riley, 21 Cal. App. (2) 165, which dealt with a very similar subject, Mr. Justice Pullen, speaking for the District Court of Appeal of the Third Appellate District, said:

> "In this proceeding in mandamus to compel the State Controller to draw a warrant in payment of a claim for work and material in cleaning the windows in certain state buildings pursuant to an independent contract, where it was the purpose of Article XXIV of the State Constitution and Civil Service Act to bring thereunder all services to be rendered to the state except where specifically excepted, and the services in question were not of the excepted classes, the state was without authority to enter into an independent contract for the work in question."

Here, in our case, the city is furnishing what it feels is adequate street flushing work in the area in question. The fact that the property owners and business interests, covering the area in question, desire to supplement this already adequate city street flushing (and have done so for many years past out of their own funds) is most commendable - but the city is unable to contract with the association to bear the whole or any part of the cost of this service for the reasons heretofore indicated.

Answering your last inquiry, as the flushing machine is privately owned and operated by the association, for its own purposes, the city cannot bear the $227.00 cost of a license fee imposed by the State of California on the sprinkling truck owned by the association.

You are thus advised in connection with your inquiries as submitted.

Respectfully submitted,

CITY ATTORNEY

To: Board of Supervisors
Attn: John R. McGrath, Esq.
cc: The Mayor

4215

December 16, 1948

SUBJECT: JURISDICTION OF SHERIFF AND POLICE DEPARTMENT OVER PRISONERS DURING PERIODS OF HOSPITALIZATION.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "During a survey presently in progress several questions have arisen with respect to the jurisdiction of the Police Department and the Sheriff's Department over hospitalized prisoners. Consequently I am requesting your opinion on the following questions:
>
> "1. On what charges does a person become a prisoner of Police Department and under what circumstances does responsibility of Police Department for a prisoner cease and responsibility of Sheriff begin?
>
> "2. What is the legal responsibility of the Police for prisoners requiring hospitalization? Must all such hospitalized prisoners be guarded? If so, must there be a separate guard for each prisoner?
>
> "3. What is the legal responsibility of the Sheriff for prisoners requiring hospitalization? Must all such hospitalized prisoners be guarded? If so, must there be a separate guard for each prisoner?
>
> "4. Assuming a special ward, equipped with security features so that one guard is deemed sufficient for all prisoners in the ward, may such guard be assigned alternately from the Police Department and the Sheriff's Department; or must the Sheriff still provide a guard for his prisoners and the Police Department a guard for their prisoners?
>
> "With all good wishes, I remain. . ."

O P I N I O N

Section 11 of Article XI of the California Constitution

contains an express grant to cities, counties and towns of the power to make and enforce within their limits all such local police regulations as are not in conflict with general laws. It cannot be doubted that the city police department is the local agency empowered and duty-bound to enforce such police regulations and to make arrest for violations thereof.

The sheriff is a state executive with county-wide powers. (State ex rel Beach v. Finn, 4 Mo. App. 347) Sections 26600 and 26601 of the Government Code impose upon the sheriff the duty to preserve the peace and to arrest all persons who have committed a public offense. Thus, whenever a crime is committed in the City and County of San Francisco, the territorial limits of each being identical, it is within the concurrent jurisdiction and duty of the sheriff and the police department to make necessary arrests. (See 8 Ops. Atty. Gen. 149)

However, the power and duty of the sheriff as custodian of the county jail to detain prisoners therein is limited by Section 4000 of the Penal Code. That section provides as follows:

> "County jails, by whom kept and for what used. The common jails in the several counties of this State are kept by the sheriffs of the counties in which they are respectively situated, and are used as follows:
>
> "1. For the detention of persons committed in order to secure their attendance as witnesses in criminal cases;
>
> "2. For the detention of persons charged with crime and committed for trial;
>
> "3. For the confinement of persons committed for contempt, or upon civil process, or by other authority of law;
>
> "4. For the confinement of persons sentenced to imprisonment therein upon a conviction for crime."

In the absence of a commitment under 1., 2., or 3., above, or without sentence as provided in 4., above, the sheriff may not detain a prisoner in the county jail. Hence, and regardless of who had effected the arrest, confinement prior to one of the foregoing forms of commitment, or before sentence, would have to be in the city prison under police

department jurisdiction. After one of the enumerated forms of commitment, or after sentence, such prisoner must be removed to the custody of the sheriff for confinement in the county jail.

Sections 4011 and 4011.5 of the Penal Code set forth the procedure to be followed in hospitalizing prisoners, including prisoners from both city and county jails. The pertinent portions of Section 4011 are as follows:

> "When it is made to appear to a judge of the superior court by affidavit of the sheriff or district attorney and oral testimony that a prisoner confined in any city or county jail requires medical or surgical treatment necessitating hospitalization, which treatment can not be furnished or supplied at said city or county jail, the court in its discretion may order the removal of such person or persons from said city or county jail to the county hospital in said county; provided, if there is no county hospital in said county, then to any hospital designated by said court; and it shall be the duty of the sheriff to maintain the necessary guards for the safekeeping of such prisoner, the expense of which shall be a charge against the county."

Under the foregoing, it is made the duty of the sheriff to furnish guards for hospitalized prisoners regardless of whether the removal of such prisoners to the hospital is from a city or a county jail. While all prisoners so hospitalized must be under guard, it is not compulsory that each prisoner be under a separate guard. Under the section, the sheriff is free to exercise a discretion in determining the extent of the guard required, his statutory duty being only to furnish 'necessary' guards. Under Section 4011, the police department has no legal responsibility to furnish guards for hospitalized prisoners.

Section 4011.5 provides as follows:

> "<u>Removal of prisoner from jail when health requires</u>. Whenever it appears to a sheriff or jailer that a prisoner in a county jail or a city jail under his charge is in need of immediate medical or hospital care, and that the health and welfare of the prisoner will be injuriously affected unless he is

> forthwith removed to a hospital, the sheriff or jailer may authorize the immediate removal of the prisoner under guard to a hospital, without first obtaining a court order as provided in Section 4011. In any such case, however, if the condition of the prisoner prevents his return to the jail within 48 hours from the time of his removal, the sheriff or jailer shall apply to a judge of the superior court for an order authorizing the continued absence of the prisoner from the jail in the manner provided in Section 4011. The provisions of Section 4011 governing the cost of medical and hospital care of prisoners and the liability therefor, shall apply to the cost of, and the liability for, medical or hospital care of prisoners removed from jail pursuant to this section."

Under the foregoing section, in emergency cases prisoners in the city jail--and thus under the jurisdiction of the police department--may be removed to a hospital, under guard, for a period not in excess of 48 hours; and in such emergency the procedure outlined in Section 4011 need not be followed. In those limited cases, the police department would have to furnish any necessary guard or guards during the 48 hour period. Thereafter, any continued hospitalization required would have to be in accordance with the procedure outlined in Section 4011--including, as therein provided, the furnishing of necessary guards by the sheriff.

Your queries 1., 2., and 3., are answered by the foregoing. With regard to question 4., in your request for opinion, what has been written above illustrates that wherever Section 4011 is applicable, a police department guard or guards for such security ward would be without authority; the sole responsibility for prisoner security being thereby imposed upon the sheriff. However, if prisoners hospitalized in emergency cases from the city jail were placed in the security ward for the 48 hour limit provided for by Section 4011.5, the police department would be obliged to furnish all necessary guards for such city jail prisoners. The respective security duties of the sheriff and police department may not be delegated or interchanged between them.

Respectfully submitted,

To: The Mayor

CITY ATTORNEY

FB

4216

December 16, 1948

SUBJECT: IMPROVEMENT OF EXTERIOR WALL OF MARSHALL SQUARE BUILDING; WHETHER EXPENDITURE THEREFOR CONSTITUTES A GIFT OF PUBLIC FUNDS; VALIDITY OF LEASE OF EXTERIOR WALLS.

Dear Sirs:

I have your request for an opinion as follows:

"Attached hereto please find copy of a letter addressed jointly to the Board of Supervisors and the Mayor from the Citizens' Committee to Study Beautification of the Orpheum Building Wall Facing Civic Center, setting forth therein a communication from Mr. George A. Crothers, President of the Orpheum Building Company, addressed to Mr. Joseph A. Brown, outlining the terms of a proposed agreement pursuant to which the exterior of the Orpheum Theater might be improved and made to conform to the general type of architecture prevailing in the Civic Center.

"I have been directed by the Finance Committee to refer this matter to you for your consideration and opinion as to the legality of such a lease and I have further been directed to inquire whether or not the expenditure of money for such a project would constitute a gift of public funds."

OPINION

The essential test as to whether a proposed expenditure constitutes a gift of public funds is whether the money is being expended for a public or private purpose. Where the statute authorizes the expenditure for a public purpose and the money is so expended the courts are uniform in upholding the validity of the legislation. (Green vs Frazier, 250 U.S. 233; San Francisco vs Collins, 216 Cal. 187; City of Oakland vs Williams, 206 Cal. 315; Allbritton vs. Winona, 178 So. 799; County of Los Angeles vs Dodge, 51 Cal. App. 492; Larsen vs San Francisco, 182 Cal.; Irish vs. Holm, 208 Cal. 339). The validity of such legislation is unaffected by the fact that by reason of the expenditure there may be an incidental benefit to private individuals or corporations. (American Co. vs City of Lakeport, 220 Cal. 548). Veterans' Welfare Board vs Jordan, 189 Cal. 124).

The expenditure now under consideration would be for the sole purpose of improving the exterior of the Orpheum Theater wall and making it conform to the general type of architecture now prevailing in the Civic Center, as there has been nothing called to

my attention that would indicate that the improvement would be of any particular benefit to the owners of the building. The project would thus complete and harmonize the general architecture scheme of the Civic Center and would remove an "eyesore" that has been a constant source of unfavorable comment throughout the years. It is my opinion that this is a public purpose and that public funds may validly be expended therefor. You will note the following significant language of the Supreme Court in the case of Leis vs City and County, 213 Cal. 268, speaking with reference to the general plan of beautification of our Civic Center:

> "We do not hold, however, that in conformity with such uses the municipality may not provide for such ornamentation of this broad avenue, (Fulton Street) as for example by way of fountains, parked areas or even ornamental entrances as will tend to its beautification and to that of the Civic Center of which it forms a very essential feature without materially interfering with, but rather ministering to its uses as a broad and beautiful avenue or esplanade."

In order to effectuate the foregoing purpose under the proposed plan the City will lease the exterior wall of the building at a nominal yearly rent, and you ask whether such a lease would be legal. I can find no Charter or constitutional inhibition against the City's entering into such a lease. Section 2 of our Charter provides in part as follows: "The City and County of San Francisco .... may, subject to the restrictions contained in this Charter, purchase, receive, hold and enjoy, sell, lease and convey real and personal property ..."

In the case of "In Re City and County of San Francisco, 195 Cal. 433, as against the contention that the City and County had no power under its Charter to lease privately owned real estate the Court stated as follows:

> "It is a general rule of interpretation applicable to charters that the broad power 'to purchase, reserve, hold and enjoy real and personal property' embraces and includes the lesser power to lease the same classes of property."

Also see Revised Vol. 3 McQuillen, Municipal Corporations, page 985.

However, such a lease to be valid must provide for a mutuality of obligation and from this standpoint I find the general conditions outlined by the owners of the building to be included in the lease objectionable, particularly the condition set forth in paragraph (e) which would give the owners the right to cancel the lease at any time upon resolution of their board of directors. This condition would in effect give the city a mere revocable license to

the use of the premises which would not be a sufficient property interest to warrant the expenditure. (See County of Alameda vs Ross, 32 C.A. 2d p. 137.) Also under the conditions outlined the owners following the completion of the improvement would have the right to change or alter it at will. Thus, a situation could be created where the city after expending its funds for the improvement could lose complete control of it by having their rights in the premises cancelled at any time and the public purpose of the expenditure could be nullified at any time by a non-conforming change or alteration in the improvement by the owners.

The matter should therefore be renegotiated with the owners on a basis that would give the city a definite, subsisting property interest in the wall and its improvement that would exist as long as the building existed and that would be subject to extinguishment only upon demolition or destruction of the building. Likewise, the conditions should provide that no changes or alterations can be made in the wall that would affect the improvements constructed by the city without the consent of the city.

In conclusion, you are advised that it is my opinion that the city may validly enter into a lease for the exterior surface of the walls of the Marshall Square Building and that the expenditure of money for the improvement of said walls would not constitute a gift of public funds, but that the general conditions proposed by the owners for inclusion in the lease are legally objectionable as above outlined.

Respectfully submitted,

John J. O'Toole

City Attorney.

To: Board of Supervisors
Attn: Mr. John A. McGrath

TJB

4217

December 17, 1948

SUBJECT: ANGEL ISLAND, TAXATION BY MARIN COUNTY ON ACQUISITION BY CITY AND COUNTY OF SAN FRANCISCO.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "Pursuant to the direction of Supervisor Mancuso you are hereby respectfully requested to render your written opinion as to whether or not, in the event that Angel Island is acquired by the City and County of San Francisco from the Federal Government, the real property thereof, as well as the improvements erected or maintained thereon by the City and County, will be subject to taxation by Marin County, in which the real property is situated."

O P I N I O N

Article XIII, §1 of the Constitution of the State of California provides in part as follows:

> ". . . property used for free public libraries and free museums, growing crops, property used exclusively for public schools, and such as may belong to the United States, this state, or to any county, city and county, or municipal corporation within this state shall be exempt from taxation, except such lands and the improvements thereon located outside of the county, city and county, or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation; provided, that no improvements of any character whatever constructed by any county, city and county or municipal corporation shall be subject to taxation. . ."

Whether land and improvements acquired by a county, city and county, or municipal corporation, which are located outside said county, city and county, or municipal corporation, are subject to taxation in the county where they are located, is dependent upon whether the land and improvements were subject

to taxation at the time of acquisition. If the land and improvements were not subject to taxation by the county in which they are located at the time they were acquired, they are not thereafter subject to taxation.

See:

City and County of San Francisco v. County of Alameda, 5 Cal. (2d) 243;

City and County of San Francisco v. County of San Mateo, 17 Cal. (2d) 814.

Furthermore, no improvements of any character whatever constructed by any county, city and county, or municipal corporation after acquisition are subject to taxation. (Article XIII, §1, Constitution of the State of California)

As Angel Island is presently owned by the United States of America, the land and improvements thereon are not subject to taxation by the County of Marin. Article XIII, § 1 of the Constitution of the State of California specifically exempts from taxation property belonging to the United States.

If the City and County of San Francisco should acquire Angel Island directly from the United States, the land and improvements presently located thereon would not be subject to taxation by the County of Marin because at the time of acquisition by the City and County of San Francisco the land and improvements thereon were not subject to taxation by the County of Marin. Furthermore, any improvements constructed by the City and County of San Francisco on Angel Island after its acquisition by the City and County of San Francisco would also not be subject to taxation by the County of Marin.

Respectfully submitted,

CITY ATTORNEY

To: Clerk, Board of
Supervisors

cc: The Mayor

4218

December 20, 1948

SUBJECT: NO INTEREST ALLOWABLE ON JUDGMENT - KENNEY v. WOLFF.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

"May I please have your opinion as to whether or not the petitioners in the matter of Kenney v. Wolff (Mar. 26, 1948) 84 A.C.A. 713, are entitled to interest from the date of entry of the judgment on the amounts the court awarded to them, namely the difference between the wages they have been paid and those applicable to the positions to which they were held to be entitled."

O P I N I O N

In Kenney v. Wolff the petitioners and plaintiffs filed a petition and complaint for writ of mandate, injunction and declaratory relief. The trial court's judgment (entered on September 18, 1946; recorded on September 19, 1946, in Book 703 of Judgments, at page 145, in office of the County Clerk of the City and County of San Francisco) ordered, adjudged and decreed, among other things, that:

(a) Certain of the plaintiffs and petitioners were entitled to certain positions as of the date of acquisition of the Market Street Railway by the City, September 29, 1944, and to the compensation of such positions from and after that date;

(b) Such plaintiffs and petitioners have and recover from defendands all compensation applicable to such positions, such amount to represent the difference between the compensations paid them and the amount applicable to the positions to which they were held entitled from September 29, 1944 to date of classification in such position;

(c) The Civil Service Commission had acted arbitrarily and in excess of its jurisdiction in classifying and assigning petitioners and plaintiffs to positions which were subordinate and not comparable with their former positions with the Market Street Railway Company;

(d) A peremptory Writ of Mandate issue directing respondents to admit said plaintiffs and defendants to the occupancy, etc., of the positions from which they had been barred, and to compensate them at the rate applicable to such positions from and after September 29, 1944; and

(e) Respondents and defendants be permanently enjoined and restrained from barring said petitioners and plaintiffs from the occupancy, title, use, enjoyment, emoluments and compensation of the positions to which they are therein held to be entitled.

A Peremptory Writ of Mandate made and filed by the Court on the same day (September 18, 1946), ordered the defendants to admit said petitioners and plaintiffs to the occupancy, title, use, enjoyment and emoluments of such positions with permanent status effective as of September 29, 1944; to place their names upon all records of the City as the holders and occupants of such positions commencing as of September 29, 1944; and to compensate and pay them the rate applicable to such positions as of, from and after September 29, 1944.

The above mentioned portion of the judgment was appealed from (Another cause of action regarding seniority was reserved for trial). The District Court of Appeal affirmed the trial court's judgment on March 26, 1948 (84 A.C.A. 713). A petition for rehearing and a petition for hearing by the Supreme Court were denied; and the remittitur affirming the judgment and copy of the opinion of the District Court of Appeal filed with the County Clerk on March 27, 1948.

With respect to the question of interest, the Kenney case appears to be governed by Nilsson v. State Personnel Board (1939) 36 Cal. App. (2) 186.

In the Nilsson case, supra, the petitioner, a civil service employee, had been reinstated in the department of agriculture (Nilsson v. State Personnel Board, 25 Cal. App. (2) 699); and, in accordance with the judgment therein rendered, had been paid all salary to which he was entitled. Respondents, however, refused to pay to petitioner any interest upon the unpaid back salary, and upon presenting the matter to the superior court, a peremptory writ of mandate was issued requiring and directing the payment of such interest.

On appeal from that order the sole question was whether or not the adjudication in the mandamus proceeding, ordering payment to an improperly dismissed state civil service employee of salary during the period between dismissal and reinstatement, is such a judgment as will bear interest from the date of its entry under the provisions of Section 22, Article XX of the State Constitution.

The appellate court pointed out that there is a clear distinction between a money judgment entered in a civil action and a judgment entered in a special proceeding in mandate (See cases cited therein); and held that an adjudication in a mandamus proceeding ordering an officer to perform a duty required of him by law, is not a money judgment, and therefore is not such a judgment as will bear interest.

The court said that this principle had been theretofore announced in the case of Sheehan v. Board of Police Commissioners, 188 Cal. 525, 206 P. 70. In that case the Superior Court entered judgment annulling orders dismissing the petitioner from the Police Department of the City, adjudged that he receive his accrued pensions as a disabled and retired officer, establishing the aggregate amount then accrued as $4,600, and directed a writ of mandate to issue against the board of police commissioners and ordered the board to issue a warrant drawn upon the auditor and treasurer for the specified amount. The orders were affirmed on appeal. Sheehan then applied for and obtained an order directing issuance of a peremptory writ of mandate directing said board to issue a warrant for payment of legal interest on the pension. Upon appeal it was held that the adjudication in such proceeding was not such a judgment as would bear interest from the date of its entry.

You are accordingly advised that I am of the opinion that the petitioners and plaintiffs in the Kenney case who were adjudged entitled to the difference between the actual wages paid and those applicable to the positions to which they were entitled from and after September 29, 1944, are not entitled to interest upon such amounts from the date of entry of the judgment.

Respectfully submitted,

CITY ATTORNEY.

To: Controller
NSW

No. 4219 OVERRULED

SEE 81-18

#219

December 20, 1948

SUBJECT: POWER OF BOARD OF SUPERVISORS TO ADOPT RESOLUTIONS RE AID TO CHINA, DE JURE RECOGNITION OF ISRAEL AND REMOVAL OF WHITE RUSSIANS FROM CHINA.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

"The Board of Supervisors at its meeting to be held on Monday, December 20, will have before it for consideration the following matters:

(1) Proposed resolution, urging Federal officials to grant aid to China,

(2) Proposed resolution, memorializing the President to oppose the proposals for the partition of Israel and to accord de jure recognition of Israel,

(3) Proposed resolution, memorializing Congress to assist in the removal of White Russians from China.

"Pursuant to the direction of Supervisor Marvin E. Lewis you are hereby respectfully requested to furnish, at or prior to the meeting of December 20th, your written opinion as to whether or not it is within the power of the legislative body, and is a proper legislative function and within the intent and express or implied terms of the Charter for the Board of Supervisors to adopt resolutions such as those mentioned above.

"Copies of said proposed resolutions are attached hereto for your information."

O P I N I O N

Section 9 of the Charter provides, in part, that "The powers of the city and county, except the powers reserved to the people or delegated to other officials, boards of commissions by this charter, shall be vested in the board of supervisors and shall be exercised as provided in this charter."

Section 2 provides, in part, that "The exercise of all rights and powers of the city and county when not prescribed in this charter shall be as provided by ordinance or resolution of the board of supervisors."

The Charter contains no provision expressly or impliedly allowing official action by the Board of Supervisors concerning the matters involved in the proposed resolutions.

The Charter, however, is not a grant of power, but only a limitation upon power; and, with respect to municipal affairs, the Board of Supervisors may, by ordinance or resolution, take any official action which does not contravene a Charter provision. (West Coast Advertising Co. v. San Francisco, 14 Cal. (2d) 516; Adams v. Wolff, 84 A. C. A. 554.) That freedom of action only relates to "municipal affairs," which have been held to "refer to the internal business affairs of a municipality." (Fragley v. Phelan, 126 Cal. 383.)

Federal aid to China, federal assistance to White Russians in China and action by the United States Government on the Israel issue bear absolutely no relation to "the internal business affairs" of the City and County of San Francisco. Any attempt by the Board of Supervisors to take official action thereon by resolution or ordinance would be beyond their charter powers.

Since, for the reasons above expressed, the Board can not take the questioned action under the autonomous home rule principles combined in the State Constitution and the local Charter, the next question presented is whether any general law authorizes such action.

It is firmly established that with regard to non-municipal affairs, the powers of the various political subdivisions of the State and the powers of the officials, boards and agencies of such subdivisions, are controlled by general State law. (Department of Water and Power v. Inyo Chemical Co., 16 Cal. (2d) 744; Wilkes v. City and County of San Francisco, 44 Cal. App. (2d) 393).

Under State law, Boards of Supervisors are creatures of statute, and the authority for any action on their part must be found in statutory law--either expressed or to be implied from expressed powers. (County of Modoc v. Spencer, 103 Cal. 498; Couts v. County of San Diego, 139 Cal. App. 706; H. D. Haley v. McVay, 70 Cal. App. 438; 7 Cal. Jur. 449). Part 2 of the Government Code (Sections 25000-26488) sets out with considerable particularity the general law re the composition, powers and duties of boards of supervisors. No power of the type sought to be exercised in the proposed resolutions is included in such general law, nor is any power therein provided from which the right to take action of the type contemplated may be reasonably implied. All of the powers granted relate to local matters--i. e., "municipal affairs"--and, as above noted, the issues involved in the contemplated resolutions are not of that category.

You are accordingly advised that the query contained in your request for opinion must be answered in the negative.

Respectfully submitted,

JNO. J. O'TOOLE

CITY ATTORNEY

To: Board of Supervisors
cc: Mayor

FB

4220

December 23, 1948

SUBJECT: ENLARGEMENT OF "TIME" TO BE USED IN DETERMINING QUALIFICATIONS FOR RETIREMENT, AS SET FORTH IN SECTION 165.2 (G) (1) OF THE CHARTER, CAN ONLY BE BY CHARTER AMENDMENT-TEMPORARY EMPLOYEES RE RETIREMENT SYSTEM.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

"Until September 14, 1942, when Section 222, Article 3, Part I, of the Municipal Code was amended, persons under certification from civil service eligible lists for temporary employment, were excluded from membership in the Retirement System unless they were already members of the Retirement System at the time they entered the temporary status. During the period of exclusion such temporary employees, of course, did not contribute to the Retirement System and consequently did not accumulate credit for service rendered in a temporary status.

"On September 14, 1942, Section 222 was amended by Ordinance 1777 (Series of 1939) to provide that persons under such temporary certifications would become members of the Retirement System upon the completion of six months of service uninterrupted by a break of more than one month. On and after that date, many persons under temporary employment have been members of the System in that status and so have contributed and accumulated credit for service under the System.

"Many persons excluded from service while in a temporary status, ultimately became members of the System, not through the amendment mentioned in the preceding paragraphs, but by change in their status, usually to that of persons certified from civil service eligible lists for permanent employment.

"The proposal now has been made that the retirement law be amended to give credit to present members of the System who were excluded at one time and for varying periods, from membership while serving under temporary certification. Contributions would be made on the basis of salary earned in such status, although the details of adjustments in contribution accounts have not been discussed. In the consideration of the proposal, note has been taken of subdivision (G) (1) of Section 165.2* reading as follows:

* Charter

"(G) The following time and service shall be included in the computation of the service to be credited to a member for the purpose of determining whether such member qualifies for retirement and calculating benefits:

"(1) Time during which said member is a member of the retirement system and during and for which said member is entitled to receive compensation because of services as a miscellaneous officer or employee.

"The question has arisen as to whether the Board of Supervisors, by ordinance, can grant credit for time prior to July 1, 1947, which is the effective date of Section 165.2, rendered in a status then not requisite for membership in the Retirement System, and therefore rendered while the individual concerned was not a member of the System. Before proceeding further with the proposal recited in the fourth paragraph of this letter, it is important that we know whether, to grant credit for the temporary service as proposed, it will be necessary only that the Municipal Code be amended, or whether, on the contrary, it will be necessary to amend the Charter, in view of Subdivision (G) (1) quoted above."

O P I N I O N

Section 165.2, subdivision (G)(1) of the Charter provides, as you have indicated, to wit:

"(G) The following time and service shall be included in the computation of the service to be credited to a member for the purpose of determining whether such member qualifies for retirement and calculating benefits:

"(1) Time during which said member is a member of the retirement system and during and for which said member is entitled to receive compensation because of services as a miscellaneous officer or employee."

This Charter provision expressly states <u>what time and service</u> are to be included in determining (1) whether one qualifies for retirement, and (2) in calculating the benefits to be allowed thereunder. The <u>time</u> therein specified is the:

"Time during which said member <u>is</u> a member of the retirement system and during and for which said member is entitled to receive compensation because of services as a miscellaneous officer or employee."

In view of the Charter limitation above, any effort to extend the time and service to be so used, in determining whether one qualifies for retirement and calculating benefits, to include service rendered while the individual concerned was not a member of the retirement system, could only be accomplished by Charter amendment.

You are so advised in connection with your inquiry as submitted.

Respectfully submitted,

CITY ATTORNEY.

To: Retirement Board

4221

December 28, 1948

SUBJECT: APPOINTMENT OF PUBLIC WELFARE DIRECTOR AS DEPUTY DIRECTOR OF STATE DEPARTMENT OF SOCIAL WELFARE NOT A VIOLATION OF SECTION 142 OF THE CHARTER

Dear Sir:

This office is in receipt of your request for an opinion as follows:

"On Monday, December 6, 1948, the Board of Supervisors passed Resolution No. 8148, Series of 1939, authorizing the President of the Board to enter into certain contracts with the State of California for the continued administration of Old Age Security and Security for the Blind by the City and County of San Francisco through the Public Welfare Department and the Controller's Office. This resolution reads in part:

'WHEREAS, The State desires the Board of Supervisors to nominate a qualified person to serve as Deputy Director of the State Department of Social Welfare for the administration of such aids by and in San Francisco for and on behalf of the State;

****

'BE IT FURTHER RESOLVED, That the Director of Public Welfare of the City and County of San Francisco is hereby designated by this Board of Supervisors as the person to be appointed as Deputy Director of the State Department of Social Welfare for the administration of such aids by and in San Francisco for and on behalf of the State.'

The contract between the State Department of Social Welfare and the City and County of San Francisco which the President of the Board was authorized to sign pursuant to Resolution No. 8148 reads in part as follows:

'The Director of the State Department of Social Welfare shall appoint the county welfare director, or person by whatever title designated who acts as county welfare director, or such other qualified person as the Board of Supervisors of County may designate, as a Deputy Director of the State Department of Social Welfare with full authority to take final action in determining the eligibility of applicants and recipients of security under

said Article XXV and with respect to restoring, increasing, or decreasing of security granted under Article XXV and to certify payrolls of persons eligible to receive security under said Article XXV, and such Deputy Director of the State Department of Social Welfare shall take all final action with respect to said matters.'

The last paragraph of Section 142 of the Charter of the City and County of San Francisco provides:

> 'Any person holding a salaried office under the city and county, whether by election or appointment, who shall, during his term of office, hold or retain any other salaried office under the government of the United States, or of this state, or who shall hold any other salaried office connected with the government of the city and county, or who shall become a member of the legislature, shall be deemed to have thereby vacated the office held by him under the city and county.'

The appointment of the Public Welfare Director of the City and County of San Francisco as Deputy Director of the State Department of Social Welfare would not in any way carry with it any salary from the State of California and as indicated by the resolution and contract, would be only for the purpose of expediting and making readily possible an efficient and simplified operation under the contract.

We have discussed the above informally with Mr. Ward of your office and it appears to us that the acceptance by the Director of Public Welfare of an appointment as Deputy Director of the State Department of Social Welfare for purposes of this contract would not represent a circumstance coming within the provisions of Section 142 of the Charter as quoted above.

We would very much appreciate your opinion, however, as to whether or not the accepting of such an appointment as Deputy Director of the State Department of Social Welfare by the Director of Public Welfare would in any way jeopardize or have a bearing on his employment and the conditions of his employment with the City and County of San Francisco, either in reference to Section 142 of the Charter or otherwise."

O P I N I O N

The question contained in your request is concerned primarily with the application of the last paragraph of Section 142 of the Charter which appears verbatim in your request.

As you have indicated, the appointment of the Public Welfare Director of the City and County of San Francisco as Deputy Director of the State Department of Social Welfare would not in any way carry with it any salary from the State of California. I advise you therefore, that the appointment of the Public Welfare Director in this capacity would not be a violation of the provisions of Section 142 of the Charter inasmuch as this Section clearly prohibits the appointment of a salaried officer of the City and County to another salaried position in the City and County of San Francisco, State of California or United States Government.

Therefore, you are advised, that the Director of Public Welfare would not in any way jeopardize his position as Director of Public Welfare of the City and County of San Francisco by the acceptance of an appointment as Deputy Director of the State Department of Social Welfare.

Respectfully submitted,

CITY ATTORNEY

To: Director of Public Welfare
cc: Wm. L. Henderson - Civil Service Commission
BJW, Jr.